(23,877)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 266.

GLENN R. BOTHWELL, PLAINTIFF IN ERROR,

vs.

BINGHAM COUNTY, STATE OF IDAHO; HEBER C. C. RICH, ASSESSOR AND EX-OFFICIO TAX COLLECTOR OF BINGHAM COUNTY, STATE OF IDAHO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

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a In the Supreme Court of the State of Idaho.

GLENN R. BOTHWELL, Appellant,

vs.

BINGHAM COUNTY, State of Idaho, and HEBER C. C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, Idaho, Respondents.

Attorneys for appellant: William A. Lee, Esq., W. H. Wilkins, Esq., J. D. Skeen, Esq.
Attorneys for Respondents: J. E. Good, Prosecuting Attorney, Bingham Co., Idaho; John W. Jones, Esq.

Transcript on Appeal from the District Court of the Sixth Judicial District of Idaho in and for Bingham County.

1 In the District Court of the Sixth Judicial District of Idaho in and for Bingham County.

GLEN R. BOTHWELL, Appellant,

vs.

BINGHAM COUNTY, State of Idaho; HEBER C. C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, State of Idaho, Respondent.

Amended Complaint.

Glen R. Bothwell, by leave of Court first had and obtained, files this as his amended complaint and for himself and all others similarly situated and having a common interest in the subject matter hereof, who wish to join herein and bear their proportion of the costs and expenses of this proceeding, complain of defendant and alleges:

1.

That the defendant Bingham County, is one of the legal subdivisions of the State of Idaho and a body politic and corporate and as such is vested with the power and authority to levy all taxes in said county and has pretended to levy and is seeking to collect the taxes hereinafter complained of; and the defendant, Heber C. C. Rich, is now and has been ever since on or about the first day of March, 1911, Assessor of Bingham County and ex-Officio Tax Collector of all taxes levied upon the real estate located in said County of Bingham for the use of the said County of Bingham, State of Idaho.

2.

2 That on the 18th day of August, 1894, the United States enacted a law providing for the reclamation of arid and desert lands in the various states, the same being entitled "An Act

Making Appropriation for sundry civil expenses of the Government for the fiscal year ending June 30th, 1895 and for other purposes" (28 Stat. L. 422) and the amendment thereto by the Act of June 11, 1896 (29 Stat. L. 434) and also the amendment thereto by the act of March the 3rd, 1901 (31 Stat. L. 1188) commonly known and hereinafter designated the "Carey Act."

3.

That by Chapter 5 Title 9 of the Idaho Revised Code the State of Idaho accepted the terms and conditions of the said "Carey Act," together with all the amendments thereto and all the grants of land to the said State of Idaho, under the provisions of the said Act and the amendments thereof, and by the said Chapter the said State of Idaho vested the selection, management and disposal of said lands in the State Board of Land Commissioners of said State, as constituted by Section 7 of Article 9 of its constitution.

4.

That pursuant to the said Acts of Congress and the acceptance thereof by the State of Idaho, as hereinbefore set forth, the United States, through its proper officers, on the 19th day of July, 1899, entered into a contract with the State of Idaho which said contract is in words and figures as follows:

"These Articles of Agreement, made and entered into this 19th day of July, A. D. 1899, by and between E. A. Hitchcock, Secretary of the Interior, for an- on behalf of the United States of
3 America, party of the first part, and Frank Steunenberg, for and on behalf of the State of Idaho, party of the second part, witnesseth:

That in consideration of the stipulations and agreements hereinafter named, and of the fact that the said State has, under the provisions of Section 4 of Act of Congress, approved August 18th, 1894, through Frank Steunenberg, its proper officer, thereunto duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character, and particularly described as follows, to wit:

Herein follows a description of the segregation by legal subdivisions and includes a total of 51,178.45 acres, in which list of lands is included, the Northwest Quarter of the S. E. ¼ and the N. E. ¼ of the S. W. ¼ and Lot 4, being the S. W. ¼ of the S. W. ¼ and S. E. ¼ of the S. W. ¼ of Section 18, Twp. 4, S. R. 33 E. B. M. being the land of plaintiff hereinafter described, and after said description of land said contract continues as follows:

"and has filed a map of said lands, and exhibited a plan showing the mode by which it is proposed that said lands shall be irrigated and reclaimed, and the source of water to be used for that purpose, the said party of the first part contracts and agrees, and by and with the consent and approval of William McKinley, President thereof, hereby binds the United States of America, to donate, grant and patent to said State, or to its assigns, free from cost for survey and price, such

parts of said lands as said State or its assigns may cause to be irrigated, reclaimed, occupied and cultivated, in accordance with the provisions of said Act of Congress, and with the regulations issued thereunder and with the terms of this contract, any time prior
4 to the 18th day of August, 1904.

It is further understood, that said State shall not lease any of said lands or use or dispose of the same in any way whatever except to secure their reclamation, cultivation and settlement; and that in selling and disposing of them for that purpose, the said State may sell or dispose of not more than 160 acres to any one person and then only to bona fide settlers who are citizens of the United States, or who have declared their intention to become such citizens, and it is distinctly understood and fully agreed that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said Act of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands.

It is further understood and agreed, that said State shall have full power, right and authority to enact such laws, and from time to time to make and enter into such contracts and agreements, and to create and assume such obligations in relation to and concerning said lands as may be necessary to induce and cause such irrigation, reclamation settlement and cultivation thereof as is required by this contract and the said Act of Congress; but no such law, contract or obligation shall in any way bind or obligate the United States to do or perform any act not clearly directed and set forth in this contract and said Act of Congress, and then only after the requirements of said Act and contract have been fully complied with.

Neither the approval of said application, map and plan, nor the segregation of said land, by the Secretary of the Interior nor anything in this contract, or in the said Act of Congress, shall
5 be construed as to give said State any interest whatever in any lands upon which they may, at the date of this contract be an actual settlement by a bona fide settler, qualified under the public land laws to acquire title thereto; nor to any lands which are, in fact, non-desert in character, and not subject to entry under the desert land laws of the United States; and any person may at any time before said State shall have finally disposed of the same, institute a contest before the register and receiver of the district in which said land is situated upon an allegation that any quarter section of said lands is non-desert in character.

It is further understood and agreed, that as soon as any of said lands may be irrigated and reclaimed as thoroughly as is now required of citizens who enter lands under the desert land law, and are occupied by actual bona fide settlers who have cultivated twenty acres of the tracts upon which they have settled, the said State or its assigns, may make proof thereof under and according to such rules and regulations as may be prescribed thereof by the Secretary of the Interior and as soon as such proof shall have been examined

and found to be satisfactory, patents shall issue to said state or to its assigns, for the tracts included in said proof.

The said State shall, out of the money arising from its disposal of said lands, first reimburse itself for any and all costs and expenditures incurred by it in irrigating and reclaiming said lands, or in assisting its assigns in so doing, and any surplus then remaining after the payment of the cost of such reclamation shall be held as a trust fund to be applied under the direction of the Secretary of the Interior to the reclamation of other desert lands within said State.

6 The said second party agrees that an accurate account shall be kept of all moneys received of said state from the sale of said lands, and of the money expended by it in the reclamation thereof, and shall from time to time render an accurate statement thereof to the Secretary of the Interior whenever required by him so to do.

And it is further stipulated, that as soon as said surplus shall have been ascertained, and the amount of said trust fund finally declared, it shall be deposited by the said State in some United States Depository, where it shall remain until it shall be withdrawn for the purpose of reclaiming other lands, as hereinbefore provided.

This contract is executed in duplicate, one copy of which shall be placed of record and remain on file with the Commissioners of the General Land Office and the other shall be placed of record and remain on file with the proper officers of said state, and it shall be the duty of said state to cause a copy thereof, together with a copy of all rules and regulations issued thereunder, or under said Act of Congress, to be spread upon the deed records of each of the counties of said state in which any of said lands shall be situated.

In testimony whereof, the said parties have hereunto set their hands, the day and year first above written.

E. A. HITCHCOCK,
Secretary of the Interior.
STATE OF IDAHO,
By FRANK STEUNENBERG,
Governor and Chairman State Board Land Commissioners."

5.

That thereafter, pursuant to the said Act of Congress and the Acts of the Legislature of the State of Idaho, accepting the terms and provisions thereof and the contract entered into between the

7 United States and the State of Idaho, in pursuance thereof, to wit: on the 23rd day of February, 1901, the State of Idaho entered into a contract in writing with the American Falls Canal & Power Co., a corporation organized under and pursuant to the laws of the State of Utah and duly authorized to do business in the State of Idaho, by the terms of which contract the said American Falls Canal & Power Co. contracted to construct a canal from a point on the west bank of Snake River, about ten miles north and east of the

City of Blackfoot, thence south-westerly through the counties of Bingham and Blaine for the irrigation of the lands segregated as aforesaid.

6.

After the execution of the contract, hereinbefore referred to between the said State of Idaho and the American Falls Canal & Power Co., the said last mentioned company proceeded to construct and did construct a canal in accordance with the terms of said contract, which canal has at all times been known as the "American Falls Canal", and on the 9th day of January, 1911, sufficient proof having been submitted to the Department of the Interior that an ample supply of water had been actually furnished for a substantial canal and lateral to reclaim approximately 50,000 acres of the land theretofore segregated by the said Government for irrigating from the said American Falls Canal, the United States executed its patent, conveying the lands so reclaimed to the said State of Idaho, to be disposed of in accordance with the terms and provisions of the said "Carey Act"; that said patent was dated January 9th, 1911 and after said date was duly delivered to the said State of Idaho and by it recorded on the 18th day of January, 1911 at 1 o'clock
8 P. M. of said day in Book 12 of Deeds, at page 436 of the records of the said Bingham County, State of Idaho.

7.

That prior to the month of June, 1909, with the approval of the State of Idaho, plaintiff entered into a contract in writing with the said American Falls Canal & Power Co. for a perpetual water right to be used upon and appurtenant to the following described premises, to-wit: the N. W. ¼ of the S. E. ¼ and the N. E. ¼ of the S. W. ¼ and Lot 4 being the S. W. ¼ of the S. W. ¼ and the S. E. ¼ of the S. W. ¼ of Section 18, in Twp. 4, S., R. 33, E. B. M. containing 150.64 acres. That said premises is a part of the arid lands segregated by the United States Government as hereinbefore set forth and is likewise included in the patent from the United States to the State of Idaho as above described.

8.

That at all the times hereinbefore mentioned, the plaintiff was and is now, a citizen of the United States, over the age of twenty-one years and was duly qualified, under the laws of the United States and of the State of Idaho, to make entry upon the public lands of the United States, under and in accordance with the terms and conditions of the said "Carey Act" and the acceptance thereof by the State of Idaho. That thereafter plaintiff made application to the State of Idaho in the manner prescribed by law to enter the premises last above described and made payment in the sum of twenty-five cents per acre therefor, which application was duly accepted by the said State of Idaho and thereafter plaintiff paid to the said State

the additional sum of Twenty-five cents per acre, being the
9 full sum required by law as the purchase price of said land; wherefore, the said State issued to said plaintiff its receipt therefore, the same being in words and figures as follows:

"Entry No. 311.

BLACKFOOT, IDAHO, May 15, 1909.

It is hereby certified that under the provisions of an Act of the Legislature of the State of Idaho, approved March the 2nd, 1899, entitled An Act providing for a State Engineer and to provide for the acceptance by the State of Idaho, from the United States, of certain lands and to provide for the reclamation, occupation and disposal of the same, commonly known as the "Carey Act", and the Acts of the Legislature amendatory thereof, Glen R. Bothwell, whose post office address is Springfield, Idaho, before me on this 15th day of May, 1909, appeared and submitted evidence of the reclamation, cultivation and settlement of entry No. 311 embracing the N. W. ¼ of the S. E. ¼ and the N. E. ¼ of the S. W. ¼ and Lot 4, being the S. W. ¼ of the S. W. ¼ and the S. E. ¼ of the S. W. ¼ of Section 18, Twp. 4, S., R. 33 E. B. M. containing 150.64 acres, and has paid to the State of Idaho, through me, the sum of $40.00 being at the rate of twenty-five cents per acre, being in full payment of said land.

(Signed) LORENZO R. THOMAS,
Agent State Land Board.

This is to certify that the reclamation, cultivation and settlement of the land embraced in entry No. 311 referred to in the above certificate has been examined and has been hereby approved this 25th day of June, 1909 by order of the State Board of Land Commissioners.

(Signed) M. I. CHURCH, *Register.*"

That said premises were not embraced within any patent
10 theretofore issued by the United States to the said State and it was the duty of said State to forward said proofs to the Secretary of the Interior, for his approval and request that a patent be issued to said state in trust for this plaintiff, but said state wholly neglected and refused so to do; that on or about January 10, 1910, said state applied to the Interior Department for a patent for the lands embraced by what was termed "List for Patent No. 5" which in the great part comprised the lands that had theretofore been segregated as alleged in paragraph 4 hereof and offered in support of said application certain proof that an ample supply of water had actually been furnished in a substantial ditch or canal, to reclaim said particular tract or tracts of land, but the Secretary of the Interior, upon due consideration, held such proof insufficient and rejected said application for patent and notified said state that its said contract of segregation, with the United States, would be forfeited and that all of said lands would be restored to the public domain

for entry and settlement under the public land laws, because said state had not complied with its said contract with the United States, and thereupon said state on or about October 1910, asked leave to renew its said application for patent to said lands and submitted proofs that it had caused to be done further and additional work and taken further action to cause to be furnished an ample supply of water in a substantial ditch or canal for the reclamation of said lands, in accordance with the requirements of said Carey Act, and thereafter the said Secretary heard and considered said state's further proofs and showing in support of its renewed application for patent and on or about December 1910 clear listed said lands
11 embraced in "List for Patent No. 5" for patent, and thereafter patented the same to said state as hereinbefore alleged, but a large amount of said lands, so patented to said state, have never been settled upon or occupied by actual settlers or at all and neither said application for patent nor said clear list contained the name of any settler or occupant thereon, but the whole of said lands included within said patent, was conveyed to said state to enable it to carry out said trust and thereafter convey said lands to actual settlers as such settlers' right should appear, under the provisions of said Carey Act, and at no time prior to said patent did said state ever show any settlement or occupancy of any particular part of said tract, to the United States.

9.

That thereafter, on the 10th day of February, 1911, the said State of Idaho, issued to plaintiff, its patent, thereby conveying to him clear of all incumbrances of whatsoever nature, a fee simple title to the said premises and since the date of said patent plaintiff has been and now is the legal owner of the same.

10.

That on the 9th day of January, 1911, the defendant Heber C. C. Rich, as Assessor and Collector as aforesaid, valued plaintiff's said land at $3,880.00 and without authority of law, pretended and attempted to levy an assessment of taxes thereon, amounting to, in all, $38.86 for general state, county and school purposes and said defendant published a notice specifying that the tax so pretended to be levied will become delinquent on the first Monday in January, 1912 and unless paid prior to that time, certain penalties would be added thereto; and defendant threatens to and will, unless
12 enjoined by this Court, on the first Monday in January, 1912, deliver to the County Auditor of said County, a delinquent list of all properties, including the premises owned by this plaintiff as hereinabove described, and as Collector, will unless enjoined, on the 4th Monday in May, 1912, publish said delinquent list including premises above described, together with the amount of tax, penalties and costs pretended to be due thereon, stating a time and place for the sale of same, and on the day so stated, will proceed to sell the same accordingly.

11.

That said proceedings are in violation of the terms and provisions of said "Carey Act" and of the laws of the State of Idaho and the said contract between the United States and the State of Idaho made in pursuance thereof and if not enjoined and restrained, will cast a cloud upon plaintiff's title to said premises and impair the obligations of plaintiff's said contract claimed and asserted under the said Acts of Congress and will deprive him of his property without due process of law in contravention of the terms and provisions of the Constitution of the United States and the laws thereof.

Wherefore: Plaintiff prays judgment that the said defendant, Bingham County and Heber C. C. Rich, Assessor and Ex-Officio Collector of said County, be enjoined and restrained from including in said delinquent tax list and assessment roll the plaintiff's name and his said premises above described, or from publishing plaintiff's name or the description of said premises in said delinquent tax list and from doing any other acts for the collection of said
13 pretended taxes or the creating of a lien or cloud upon said premises or in any manner attempting to assert, hold or claim a lien upon said premises or the taking of any action toward the collection of said pretended tax; that said pretended tax be adjudged null and void, and for such other and further relief as may be just and equitable, and for costs of this action.

Filed March 23, 1912.

Duly verified.

14 Title of Court and Cause.

Answer.

Comes now the above named defendants and without waiving their demurrer to the plaintiff's complaint, but expressly relying thereon, for their joint answer to Plaintiff's said complaint, admit, deny and allege as follows:

I.

Defendants allege that on or about the date of the execution of the contract by the State of Idaho, with the American Falls Canal & Power Company, to-wit: on or about February 23, 1901, the State of Idaho made application to the Interior Department of the United States for the segregation of over 49,000 acres of arid land, located in Bingham and Blaine Counties, and susceptible of irrigation from the Canal to be constructed under said contract, which application was duly granted and said land was immediately thereafter segregated by the Interior Department, for reclamation under said canal, which said approved segregation contained the lands of the plaintiff in his complaint described, and other lands, and which said lands of plaintiff and other lands are a part of and described in clear list No. 5, hereinafter referred to.

2.

Allege that after the execution of the contract in plaintiff's complaint referred to, by the State of Idaho with the said American Falls Canal & Power Company, the said American Falls Canal & Power Company proceeded to and did construct a canal, in accordance with the terms of said contract, which canal is known as the American Falls Canal which said canal, in accordance with the terms of said contract, was, some considerable time prior to December 21, 1910, entirely completed through the lands described in said clear list No. 5, and prior to said time, water had been furnished for the irrigation and reclamation of all the lands described in said clear list No. 5, and said lands so described had been irrigated and reclaimed in all respects and in conformity with and pursuant to the terms and conditions of the Act of Congress commonly known as the "Carey Act", under which said lands were segregated, and prior to said date, pursuant to the Act of August 18, 1894, commonly known as the "Carey Act", and pursuant to Chapter V. Title IX of the Idaho Revised Codes, and acts amendatory thereof, the said State of Idaho, through its State Board of Land Commissioners, duly vested by statutory provisions with the selection, handling and disposal of lands so selected, made application for the issuance to it, pursuant to law, of United States patent for the lands described in said clear title No. 5, and other lands, and in said application evidenced the irrigation and reclamation of said lands and the completion of said canal system, as required by law, and on said December 21, 1910, the Secretary of the Interior of the United States approved, for patent, the said clear list No. 5, covering 49,858.16 acres, and including the lands of the plaintiff in his complaint described, and the said lands having been irrigated and reclaimed, and the said canal system having been completed, the Secretary of the Interior, on said December 21, 1910, directed the issuance of patent of the United States for all of said lands described in clear list No. 5, to the State of Idaho.

3.

That pursuant to the direction of the Secretary of the Interior, by his order of December 21, 1910, on January 9, 1911, United States Patent was executed, conveying all of said lands so reclaimed to the State of Idaho, and defendants are informed and believe and upon information and belief allege that said patent was duly executed and sealed and delivered by the recordation thereof to the State of Idaho, grantee, on January 9, 1911, prior to twelve o'clock M. of said day, and likewise upon information and belief deny that the said patent was after said date delivered to the said State of Idaho.

4.

Defendants allege that some considerable time prior to June 25, 1909, the plaintiff herein, pursuant to the provisions of the said so called "Carey Act" and the laws of the State of Idaho relative

thereto, and with the approval of the State of Idaho, after procuring a contract in writing with the said American Falls Canal & Power Company for a perpetual water right to be used upon his lands hereinafter described, made entry of certain of said segregated lands, to-wit: Northwest quarter of the Southeast quarter, the Northeast quarter of the Southwest quarter, and the South half of the Southwest quarter of Section Eighteen (18), Township Four (4) South, of Range Thirty-three (33) East, Boise Meridian, in Bingham County, Idaho, and paid the fees thereon, as provided by law, which said lands are a part of the lands segregated and a part of the said clear list No. 5 and a part of the lands patented to the State of Idaho as aforesaid.

5.

That subsequent to the making of said entry, said plaintiff, prior to June 25, 1909, cultivated, irrigated and reclaimed all of the lands embraced in said entry conformable to the provisions of
17 said so-called "Carey Act", and the laws of the State of Idaho relative thereto, and made residence thereon, and on the said 25th day of June, 1909, or immediately prior thereto, made final proof on said entry, according to the provisions of said legislation, and proved and established all of the facts and matters by said legislation required to entitle him to a patent for said described premises, from the State of Idaho, and on said date, made payment to the State of Idaho of the fees therefore and thereupon, on said date, plaintiff received from the State of Idaho, through the State Board of Land Commissioners, duly authorized by law to execute the same, a certificate denominated as a final certificate of entry, and said plaintiff thereupon was entitled to a patent or conveyance of said described premises and the whole thereof from the State of Idaho, and by reason of plaintiff's full compliance with all of the requirements of the said so called "Carey Act", and the laws of the State of Idaho relative thereto, the said State of Idaho became and was thereupon entitled, upon application and demand therefore, to a patent for said described premises and the whole thereof from the United States of America, and the said plaintiff was then and thenceforth and at all times since said date has been the legal owner and holder of said described property and the whole thereof.

6.

That prior to the said 21st day of December, 1910, the said American Falls Canal & Power Company had completed the construction of its entire canal system for the irrigation of all of the land described in said clear list No. 5, and the said lands described therein, including the said lands of plaintiff, had been irri-
18 gated and reclaimed and the said corporation had acquired and had, at said time, an ample supply of water which was actually furnished in completed canals and laterals, to reclaim all of said lands described in said clear list No. 5, including the said lands of plaintiff.

7.

Defendants deny that only since February 10, 1911, plaintiff has been the owner of said real estate, but allege that at all times since June 25, 1909, said plaintiff has been the legal owner of said real estate and the whole thereof.

8.

Admit that on the 9th day of January, 1911, the defendant, Heber C. C. Rich, as such Assessor and Collector, pursuant to the authority vested in him by virtue of his said office, valued plaintiff's said land at $3880.00, and deny that without authority of law he thereafter, or ever or at all, or otherwise than in accordance with law, and in the performance of his duties as such official, levied an assessment of taxes thereon, amounting in all to $36.86, for general State, county and school purposes, and allege in this regard that the said property of plaintiff was at said time subject to taxation and that said valuation was duly and legally made by said defendant, as such officer, and due notice thereof given, and that said sum of $36.86 is the correct and proper proportion of State, County and school taxes to be levied against said land of said valuation, and that the said defendant, pursuant to Section 1731 of the Idaho Revised Codes, published a notice specifying that the tax so levied would become delinquent on the first Monday in January, 1912, and unless paid prior to that time, penalties would be added thereto in all respects pursuant to statutory provision, and the said defendant has, pursuant to law, delivered to the County Auditor a delinquent list of all property, including the said real estate of plaintiff, upon which taxes have not been paid, and will, hereafter, on the fourth Monday in May, 1912, publish said delinquent list, including said real estate, together with the amount of taxes and penalties and costs due, stating a time and place of sale of said real estate, and on the day fixed will proceed to sell the said property in all respects conformable to law, unless otherwise ordered and directed by judgment and decree of this Court.

19

9.

Defendants deny that said proceedings are or any of them is or well be in violation of the terms or provisions of said Carey Act or the laws of the State of Idaho in acceptance thereof, or either or any of them, but in this regard alleges that said lands were, on the 9th day of January, 1911, subject to taxation by Bingham County, Idaho, through its said officer, Heber C. C. Rich, and that, prior to said time, the title of said plaintiff to all of said lands was perfect and complete, without anything to be paid or any further act to be done before the said plaintiff, as such entrymen, was entitled to receive his patent therefore, and defendants deny that any cloud will be cast upon plaintiff's title otherwise than in pursuance of law, by reason of plaintiff, as a holder of property subject to taxation, failing and refusing to pay such taxes as are levied thereon, and deny that thereby or at all any contract of said plaintiff of any nature will be impaired

or that he will be deprived of his property without due process of law, contrary to the Constitution of the United States, or at all.

Wherefore, defendants having fully answered plaintiff's
20 complaint, pray that plaintiff take nothing thereby, but that the same be dismissed and they — hence discharged, with their costs herein incurred.

J. E. GOOD, *County Attorney,*
AND
JOHN W. JONES,
Residence, Blackfoot, Idaho,
Attorneys for said Defendants.

Filed March 25, 1912, as defendants' answer to plaintiff's amended complaint.
Duly verified.

21 Title of Court and Cause.

Findings of Fact and Conclusions of Law.

This cause coming on for trial before the Honorable J. M. Stevens, Judge, sitting without a jury, plaintiff being present by his counsel, Messrs. William A. Lee and W. H. Wilkins, and defendants being present by their counsel, J. E. Good, County Attorney and John W. Jones, Esq., and thereupon the following proceedings were had and done:

The above named parties, plaintiff and defendants, mutually agreeing to waive all introduction of any and all evidence herein and hereby agree and stipulate that the following is a full, true and complete statement of all of the material, competent and admissible facts pertaining to said controversy and that the same shall be used in all of the Courts having jurisdiction of said cause of action, as a statement of all of the facts in said cause and upon which the decision of said Courts and judgment herein shall be rendered.

And the said stipulation of facts being filed in said cause, and being all of the evidence taken or received therein, and the Court being fully advised in the premises, after argument of counsel for respective parties and all parties agreeing thereto, adopts the said agreed statement of facts as its findings of fact in said cause and the Court accordingly finds as follows:

1.

That the defendant, Bingham County, is one of the legal subdivisions of the State of Idaho, a body politic and corporate, and
22 as such is vested with the power and authority through its duly qualified officers to levy all taxes in said County, and has proceeded to levy and is seeking to collect the taxes hereinafter referred to; that the defendant, Heber C. C. Rich, is now and ever since some time in the month of February, 1911, has been the Assessor of said Bingham County, and ex-Officio Tax Collector of all taxes levied upon the real estate located in the County of Bingham, for the use of

said County and State; and at the said time succeeded in said office the duly elected, qualified and acting Assessor and Tax Collector of said County, Moses Wright, and at such time succeeded to all of the power and authority by law vested in said Moses Wright, as such officer of Bingham County.

2.

That on the 18th day of August, 1894, the United States enacted a law providing for the reclamation of arid and desert lands in the various states, the same being entitled "An act making appropriation for the sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes, (28 Stat. L. 422) and the amendment thereto by the act of June 11, 1896, (29 Stat. L. 434) and also the amendment thereto, by the act of March 3, 1901, (31 Stat. L. 1188), commonly known and hereafter designated as the "Cary Act."

3.

That by Chapter 5, Title 9 of he Idaho Revised Codes, the State of Idaho accepted the terms and conditions of said Carey Act, together with all the amendments thereof, and all the grants of land to the said State of Idaho, under the provisions of said act and the amendments thereof, and by said Chapter, the said State of Idaho vested the selection management and disposal of said lands in the State Board of Land Commissioners of said State, as con-
23 stituted by Section 7, of Article 9 of the Constitution of the State of Idaho.

4.

That pursuant to the said Acts of Congress and the acceptance thereof by the State of Idaho, as hereinbefore set forth, the United States, through its proper officers, on the 19th day of July, 1899, entered into a contract with the State of Idaho, as the same appears in manner and form as set forth in paragraph 4 of plaintiff's amended complaint, and the same, as so set forth, is hereby referred to and made a part of this statement of facts.

5.

That thereafter, pursuant to the said Acts of Congress and the Acts of the Legislature of the State of Idaho, accepting the terms and provisions thereof, and the contract entered into between the United States and the States of Idaho, on the 23rd day of February, 1901, the State of Idaho entered into a contract in writing with the American Falls Canal and Power Company, a corporation organized and existing under the laws of the State of Utah, and duly authorized to do business in the State of Idaho, by the terms of which contract the said American Falls Canal and Power Company contracted to construct a canal from a point on the west bank of Snake River about ten miles North and East of the City of Blackfoot, thence Southwesterly through the Counties of Bingham and Blaine, for the irrigation of the lands segregated, as set forth in said contract between the United States and the State of Idaho.

6.

That prior to the execution of said contract between the United States and the State of Idaho, the said State had made application to the Interior Department of the United States, for the segrega-
24 tion of more than 50,000 acres of arid land located in Bingham and Blaine Counties in said State, and susceptible of irrigation from the canal system to be constructed pursuant to the terms of a contract between said State and said American Falls Canal and Power Company, which said application was duly granted and said lands were fully segregated by the Interior Department on July 19, 1899, for the reclamation by said irrigation system, as provided in said Carey Act, which said approved segregation contained the lands of said plaintiffs in their complaints described, and all other lands described in list for patent No. 5, hereinafter referred to.

7.

That after the execution of the contract by the said State of Idaho with said American Falls Canal and Power Company, the said Company constructed a canal in accordance with the terms of said contract, which said Canal is known as the American Falls Canal, and was some time prior to December 21, 1910, entirely completed through the lands described in list for patent No. 5, and prior to December 21, 1910, water had been furnished for the irrigation and reclamation of the greater part of the lands described in said list for patent No. 5, which has been settled upon and occupied, including the said lands of plaintiffs, and the said lands so described had been irrigated and reclaimed in all respects in conformity with and in pursuance to the terms and conditions of the act of Congress referred to as the Carey Act, under which said lands were segregated prior to December 21, 1910, and prior to said date, pursuant to the act of August 18, 1894, commonly known as the Carey Act, and the acts amendatory thereof, and also acts pursuant to Chapter 6, Title 9 of the Idaho Revised Codes, and acts amendatory thereof,
25 the said State of Idaho, through its said Board of Land Commissioners, duly vested by statutory provision with the selection, handling and disposal of lands so selected, made application for the issuance to it, pursuant to law, of the United States patent for the lands described in list for patent No. 5, and other lands, and in said application offered evidence of the irrigation and reclamation of said lands in said list for patent No. 5, and the completion of said canal system as required by law, and on December 21, 1910, the Secretary of the Interior clear listed for patent and approved for patent, the said clear list No. 5, covering 49,858.16 acres, and including the lands of plaintiffs in their said complaint described, it being established that said lands had been irrigated and reclaimed and the said canal system having been completed, the Secretary of the Interior, on said December 21, 1910, directed the issuance of patent of the United States for all of said lands described in said clear list No. 5, to the State of Idaho, said patent being United States patent No. 168,495.

8.

That in accordance with the direction of the Secretary of the Interior, by his order of December 21, 1910, on January 9, 1911, said United States patent No. 168,495 was duly and regularly executed conveying all of said lands described in said clear list for patent No 5, to the State of Idaho, and said patent was thereafter recorded in the records of the General Land Office, at Washington, D. C. and transmitted to the Governor of the State of Idaho, and on January 18, 1911, at one o'clock p. m. of said day, said patent was duly recorded in Book 12 of Deeds, at page 436 of the records of Bingham County, Idaho.

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9.

That neither plaintiff or defendant can obtain or submit any proof as to the hour of day when said patent was executed by the United States to the State of Idaho, or at what hour the same was recorded in the General Land Office in Washington, D. C., but said patent was executed by the Officers of the United States, duly authorized, on said 9th day of January, 1911.

10.

That long prior to June, 1909, plaintiff herein was a natural born citizen of the United States, over the age of 21 years, and was duly qualified under the laws of the United States and of the State of Idaho, to make entry upon the public lands of the United States, under and in accordance with the terms and conditions of said Carey Act and the acceptance thereof by the State of Idaho, and did, pursuant to the provisions of said Carey Act and the laws of the State of Idaho, with the approval of said State, and after procuring a contract in writing with the said American Falls Canal and Power Company, for a perpetual and sufficient water right to be used upon his said lands, hereinafter described, made application to the State of Idaho in manner prescribed by law, to enter the Northwest quarter of the Southeast quarter, and the Northeast quarter of the Southwest quarter, and the South half of the Southwest quarter of Section eighteen (18), Township four (4) South of Range thirty-three (33) East, Boise Meridian, in Bingham County, Idaho, and paid the requisite fee thereof, to wit: 25 cents per acre and such other sums as were required by the regulations of the State Board of Land Commissioners, which said application was duly accepted by the State of Idaho, and which said lands
26½ were a part of the lands theretofore segregated and are included in list for patent No. 5 and clear list for patent No. 5.

11.

That subsequent to making said entry, said plaintiff, prior to June 25, 1909, cultivated, irrigated and reclaimed the lands embraced in said entry, in manner, form and amount in conformity with the requirements and provisions of the so called Carey Act and the laws of the State of Idaho relative thereto, and made resi-

dence thereon as required by law, and occupied the same, and on the 25th day of June, 1909, made all proofs on said entry according to the provisions of said State Legislature, and proved and established all of the facts and matters by said State Legislation required to entitle him to a patent to said described premises from the State of Idaho, and on said date made payment to the State of Idaho the final payment therefore of 25 cents per acre and all other charges required by said State Board of Land Commissioners, and thereupon on said date, plaintiff received from the State of Idaho, through said State Board of Land Commissioners, a certificate denominated as a final certificate of entry in the form set forth in paragraph 8 of plaintiff's amended complaint, which is by reference made a part of this agreed statement of facts.

12.

That subsequent to June 25, 1909, no payments were to be made by said plaintiff on said land, or therefore, to the United States or to the State of Idaho, or in any manner whatsoever, nor pursuant to the terms of said Carey Act or the laws of the State of Idaho, with reference thereto, *was* any further acts required to be done by said plaintiff, with reference to said particular entry, prior to the issuance of patent to the State of Idaho and to the said plain-
27 tiff, and *and* no payments were thereafter made by said plaintiff, nor was he required to do or perform any further acts with reference to said entry, provided, however, that the said canal system was thereafter completed as herein stipulated.

13.

That said premises were not embraced within any patent theretofore issued by the United States to the said State of Idaho; that on or about January 10, 1910, said State applied to the Interior Department for a patent for the lands embraced in what was in said application termed, "List for Patent No. 5," which in the greater part comprised the lands that had theretofore been segregated as alleged in paragraph 4 of this stipulation, and had offered in support of said application certain proof that an ample supply of water had actually been furnished in a substantial ditch or canal, to reclaim said particular tract or tracts of land, but the Secretary of the Interior, upon due consideration, held such proof insufficient and rejected said application for patent, and notified said State that its said contract of segregation with the United States would be forfeited and that all of said lands would be restored to the public domain for entry and settlement under the public land laws, because said State had not complied with its said contract with the United States, and thereupon said State, on or about October 1910, asked leave to renew its said application for patent to list lands, and submitted proofs that it had caused to be done further and additional work and taken further action to cause to be furnished an ample supply of water in a substantial ditch and canal for the reclamation of said lands, in accordance with the requirements of

said Carey Act, and thereafter the said Secretary, heard and
28 considered said State's further proof and showing in support of its renewed application for patent, and on or about December 21, 1910, clear listed said lands embraced in "List for Patent No. 5" for patent, and thereafter patented the same to said State, as hereinbefore stated in this stipulation of facts. But a large amount of said land so patented to said State, have never been settled upon or occupied by actual settlers, or at all, and neither said application for patent nor said clear list contained the name of any settler or occupant thereof, but the whole of said lands included within the said patent was conveyed to the said State by said United States patent, dated January 9, 1911, and numbered 168,495, and at no time prior to said patent, did said State ever show to the United States any settlement or occupancy of any particular part of said tract so obtained.

14.

That prior to said December 21, 1910, and subsequent to January 10, 1910, said American Falls Canal and Power Company, had completed the construction of its entire canal system for the irrigation of all of the lands described in said clear list No. 5, and lands described therein, including the lands of plaintiff, had been irrigated and reclaimed therefrom, and said corporation had acquired, and had, at said time, an ample supply of water, which was actually furnished in completed canals and laterals to reclaim all of the lands described in said clear list No. 5, including the lands of plaintiff, and on June 25, 1909, had acquired a water right procured from the American Falls Canal and Power Company, sufficient for the irrigation and reclamation of said lands, and said American Falls Canal and Power Company had title to a sufficient water supply for the irrigation of said lands described in
29 clear list No. 5, including the lands of plaintiff.

15.

That on the 10th day of February, 1911, the State of Idaho issued to plaintiff its patent for the premises described in plaintiff's complaint, said patent being in words and figures following, to-wit:

"The State of Idaho to all to whom these presents shall come, Greeting:

Entry No. —, Patent No. —.

Whereas, it appears that Glenn R. Bothwell has in conformity with the laws made full payment for, and has cultivated, reclaimed, resided and settled upon the following described lands situate in Bingham County, State of Idaho, to-wit: The Northwest quarter of the Southeast quarter, and the Northeast quarter of the Southwest quarter, and the South half of the Southwest quarter of Section Eighteen (18), Township Four (4) South of Range Thirty-three (33), East of the Boise Meridian, and Whereas, it appears that all acts have been done and performed in compliance with the Act of

Congress of August 18, 1894, entitled, "An act making appropriations for Sundry Civil Expenses of the Government for the Fiscal Year ending June 30th, 1895, and for other purposes," and the acts supplemental thereto, and also the Acts of the Legislature of the State of Idaho of March 2, 1899, entitled, "An Act to provide for a State Engineer, defining his duties and regulating his compensation, and to provide for the acceptance by the State of Idaho from the United States of certain lands, and to provide for the reclamation, occupation and disposal of the same," and the
30 acts supplemental thereto:

Now, know ye, That there is therefore granted by the State of Idaho unto the said Glenn R. Bothwell the tract of land above described: To have and to hold the same, with the appurtenances thereof, unto the said grantee and to his heirs and assigns forever, subject to the provisions of the laws of the United States and the State of Idaho in such cases made and provided.

In Testimony Whereof, I, James H. Hawley, Governor of the State of Idaho, and President of the State Board of Land Commissioners, have hereunto signed my name and caused the seal of the State Board of Land Commissioners to be hereunto affixed this 10th day of February, A. D. 1911.

JAMES H. HAWLEY, *Governor.*

Countersigned:

N. JENNESS,

[SEAL.] *Register State Board of Land Commissioners."*

16.

That on the 9th day of January, 1911, the Assessor and Collector of Bingham County, Idaho, by virtue of his office, and in the performance of his duties as such officer, valued plaintiff's said lands at $3,880.00, the cash value thereof, and levied an assessment of taxes thereon amounting in all to $36.86, for general State, County and school purposes, being the correct amount thereof, and did, pursuant to Section 1731 of the Idaho Revised Codes, publish a notice specifying that the taxes so levied would become delinquent on the first Monday of January, 1912, and unless paid prior to that time, penalties would be added thereto, and said defendant has, pursuant to law, delivered to the County Auditor, a delinquent list of all property, including the real estate of plaintiff, upon
31 which taxes have not been paid, and thereafter did publish a delinquent list including said real estate, together with the amount of taxes and penalties and costs due, and stated a time and place of sale of said real estate, and on said day fixed will proceed to sell the said property of plaintiff unless otherwise ordered and directed by judgment and decree of this Court. That all of the acts and proceedings of the Assessor and Collector of Bingham County, Idaho, are regular herein and constitute a compliance upon his part *of* the laws of the State of Idaho relative to the assessment and collection of taxes upon real estate in the event that it be deter-

mined that said lands of plaintiff were subject to assessments of taxes thereon for the year of 1911.

Done in open Court this 24th day of March, 1913.

(Signed) J. M. STEVENS, *Judge.*

32 *Conclusions of Law.*

Wherefore, based upon the foregoing findings of fact, the Court makes and enters herein its conclusions of law, as follows:

1.

That the lands described in plaintiff's complaint are and were subject to the assessment for taxation and levy of taxes thereon for general State, County and school purposes, on January 9, 1911.

2.

That the tax complained of in plaintiff's complaint was legally levied and is a valid and subsisting lien upon said land.

3.

That the prayer to have the defendants restrained and enjoined from assessing said premises and levying said tax thereon, and selling said premises for said taxes so levied, should be denied.

4.

That plaintiff's complaint is without equity and the same should be dismissed.

Done in open Court this 24th day of March, 1913.

(Signed) J. M. STEVENS, *Judge.*

Filed March 24, 1913.

33 Title of Court and Cause.

Decree.

On this 24th day of March 1913, this cause came on to be heard in open Court, plaintiff being present by his counsel, William A. Lee, Esq., and defendants being present by their respective counsel, J. E. Good, Esq., County and Prosecuting Attorney, for Bingham County, Idaho, and John W. Jones, Esq., and the Court having heretofore made its separate findings of fact and conclusions of law herein, and the said findings of fact and conclusions of law having been entered herein, wherefore in consideration of the premises, and based upon said findings of fact and conclusions of law, it is ordered, adjudged and decreed that the lands described in the complaint were and are subject to the assessment and taxation, and the levy of taxes thereon, for general State, County and school purposes on Jan-

uary 9th, 1911; and that the tax complained of in plaintiff's said complaint was legally levied and was and is a valid and subsisting lien upon said land; and that the prayer to have the defendants enjoined and restrained from assessing said premises and from levying said tax thereon, or from selling said premises for said taxes so levied, should be and the same is hereby denied; and that plaintiff's bill and complaint is without equity and should be and the same is hereby dismissed.

Done in open Court this the 24th day of March, 1913.

(Signed) J. M. STEVENS, *Judge.*

Filed March 24, 1913, and recorded in Book # 3 of Judgments, page 263.

34 Title of Court and Cause.

Notice of Appeal.

To the above-named defendants, J. E. Good, county attorney; John W. Jones, Esq., attorneys for said defendants, and to the clerk of said court:

You and each of you will please take notice, that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of Idaho, from the decision judgment and decree of the Court made and entered herein on the 24th day of March, 1913, and from the whole thereof.

(Signed) WILLIAM A. LEE,
W. H. WILKINS,
J. D. SKEEN,
Attorneys for Plaintiff and Appellant.

The above and foregoing notice of appeal served on defendants' counsel in due form on the 28th day of March, 1913, and service of notice by receipt of copy duly admitted as of said date by attorneys for defendants.

(Signed) J. E. GOOD,
Attorney for Defendants.

Certificate of Filing of Undertaking on Appeal.

I, J. T. Carruth, Clerk of said Court, hereby certify that the above named plaintiff did, on Friday, the 28th day of March, 1913, file in my office his undertaking on appeal in said cause, in due and regular form, and said undertaking is now on file in this office.

Given under my hand and official seal this 28th day of March, 1913.

(Signed) J. T. CARRUTH, *Clerk.*

Filed Mar. 28, 1913.

35 Title of Court and Cause.

Bill of Exceptions.

Be it remembered, that on this, the 24th day of March, 1913, this cause came on regularly for trial in open Court, before the Honorable J. M. Stevens, Judge, sitting without a jury, plaintiff being present by his counsel, Messrs. William A. Lee and W. H. Wilkins, and defendants being present by their counsel, J. E. Good, County Attorney, and John W. Jones, Esq., and thereupon the following proceedings were had and done:

The above named parties, plaintiff and defendants, mutually agreed to waive the introduction of any and all evidence herein and agreed and stipulated that the following is a full, true and complete statement of all of the material competent and admissable facts pertaining to said controversy, and that the same should be used in all of the Courts having jurisdiction of said cause, as a statement of all of the facts in said cause and upon which the decision of said Courts and judgment herein should be rendered.

And the said stipulation of facts being filed in said cause and being all of the evidence taken or received therein, and the Court being fully advised in the premises and after argument of counsel for respective parties and all parties agreeing thereto, said Court made its findings of fact and conclusions of law, and the same were duly entered in said cause, based upon said agreed statement of facts. Said findings of fact consists of 16 separate findings, numbered from 1 to 16 inclusive, and being in all respects identical with the 16 paragraphs of said agreed statement of facts, the same
36 consisting of 16 paragraphs only, said findings of fact from paragraph 1 to 16 inclusive, as the same appears in the judgment roll, are hereby referred to and are by such reference made a part of this bill of exceptions in the same manner and to the same extent as if said 16 paragraphs of said findings of fact were herein repeated and set out as the said 16 paragraphs of the agreed statement of facts in hæc verba.

And the Court having made said agreed statement of facts its findings of fact, thereupon made and entered its conclusions of law and judgment and decree based thereon, as the same appears in the judgment roll, to which conclusions of law, judgment and decree, the plaintiff then and there duly excepted and still excepts.

Errors of Law.

I.

The Court erred in its conclusion of law No. 1, in that the said conclusion is contrary to and agninst law.

2.

The Court erred in its conclusion of law No. 2 in that the said conclusion is contrary to and against law.

3.

The Court erred in its conclusion of law No. 3, in that the said conclusion is contrary to and against law.

4.

The Court erred in its conclusion of law No 4, in that the said conclusion is contrary to and against law.

5.

The Court erred in entering its decree herein and dismissing plaintiff's complaint for the reason that said decree and order of dismissal are contrary to and against law.

37 6.

The Court erred in dismissing the plaintiff's complaint and in entering judgment for the defendants and against the plaintiff.

Stipulation.

It is hereby stipulated and agreed by and between the respective parties to this action that the foregoing bill of exceptions contains a full and true statement of all of the evidence taken or considered in the trial of said action, the same consisting of the 16 paragraphs of the agreed statement of facts only, and of all of the proceedings had at and during such trial, and contains all of the evidence taken therein and is correct, and it is agreed that the same may be signed, settled and allowed by the Judge of said District Court as and for plaintiff's bill of exceptions herein, to be used upon appeal to the Supreme Court of the State of Idaho.

WILLIAM A LEE,
W. H. WILKINS,
Attorneys for Plaintiff.
J. E GOOD,
Attorneys for Defendants.

38 *Certificate of the Judge to Bill of Exceptions.*

It is hereby certified that the above and foregoing is a full, true and correct statement of all of the evidence taken and considered at said trial, the same consisting of 16 paragraphs, in the form of an agreed statement of facts, and all the proceedings had in and at the trial of the above entitled cause, and that the same is correct and is hereby settled, allowed and certified, and within the time allowed for such settlement, by stipulation of all of the parties to this action and by order of this Court, as plaintiff's bill of exceptions to be used upon appeal to the Supreme Court of the State of Idaho.

Given under the hand and seal of said Court this, the 28th day of March, 1913.

(Signed) J. M. STEVENS,
Judge of the said District Court.

Filed March 28, 1913.

39 In the District Court of the Sixth Judicial District of Idaho in and for Bingham County.

GLENN R. BOTHWELL, Appellant,
vs.
BINGHAM COUNTY, State of Idaho, and HEBER C. C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, Idaho, Respondents.

Clerk's Certificate.

I hereby certify that the within and foregoing contains and constitutes full, true and correct copies of the following papers, to-wit:
Amended complaint.
Answer to amended complaint.
Findings of fact and conclusions of law.
Decree.
Notice of appeal.
Bill of exceptions.
That said papers are all of the papers specified in the præcipe of counsel for appellant, filed March 22, 1913, which they desire to use on said appeal.

In Witness Whereof, I have hereunto set my hand and seal this 28th day of March, 1913.

J. T. CARRUTH,
[SEAL.] *Clerk of said District Court.*

40 *Record Entries.*

SUPREME COURT,
State of Idaho, ss:

BOISE, IDAHO, May 7, 1913.

Court met pursuant to adjournment.

Present: Hon. James F. Ailshie, Chief Justice; Hon. Isaac N. Sullivan, Justice; Hon. George H. Stewart, Justice, and the officers of the court, when the following proceedings (among others) were had, to-wit:

No. 2211.

GLENN R. BOTHWELL, Appellant,
vs.
BINGHAM COUNTY, Idaho, and HEBER C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, Idaho, Respondents.

This cause having been heretofore set for hearing, now on this day the same was called, J. D. Skeen appearing for appellant and

James E. Good and G. F. Hansbrough appearing for respondent. Counsel for respondent were permitted to file memorandum of additional authorities and counsel for appellant allowed until May 12, 1913, to file reply thereto. After argument the cause was submitted and by the court ordered taken under advisement.

SUPREME COURT,
State of Idaho, ss:

BOISE, IDAHO, May 21, 1913.

Court met pursuant to adjournment.

Present: Hon. James F. Ailshie, Chief Justice; Hon. Isaac N. Sullivan, Justice; Hon. George H. Stewart, Justice, and the officers of the court, when the following proceedings (among others) were had, to-wit:

(Title.)

41 This cause having been heretofore heard, submtted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Chief Justice Ailshie to the effect that the judgment of the trial court be affirmed.

It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the Sixth Judicial District in and for the county of Bingham in the above entitled cause be and the same hereby is affirmed.

Costs awarded in favor of respondent.

42 In the Supreme Court of the State of Idaho, April Term, 1913.

Filed May 21, 1913. I. W. Hart, Clerk.

GLENN R. BOTHWELL, Appellant,
vs.
BINGHAM COUNTY, Respondent.

Carey Act Lands—When Taxable—When Title Passes—State as Trustee.

1. Under the Carey Act (28 Stat. at Large, p. 422) and amendment thereto (29 Stat. at Large, p. 435) the government issues its patent to the state for the segregated lands which it is shown that provision has been made for supplying sufficient water for their irrigation and reclamation, and the state holds such title in trust for the settlers and purchasers who settle upon, cultivate and improve the land in conformity with the Carey Act and the state statutes in relation thereto.
2. Under the statute of this state (sec. 1653, Rev. Codes) as the same was in force and effect on January 9, 1911, a tax lien attached against all taxable property within the state at noon on that

day, and where patent issued on that date from the general government to the state in trust for segregated Carey Act lands, and the purchaser and claimant to a portion of such lands had prior to that date settled upon, cultivated and reclaimed the land in conformity with the acts of Congress and the statutes of the state and had made his final proofs and received a final certificate from the register of the state land
43 board, such land was taxable and subject to the tax lien attaching on that date for the year 1911.

3. The rule generally recognized by the courts with reference to the taxation of lands for which patent has not yet issued is that when payment in full has been made and settlement and improvement has been had and final proof thereof has been made and the proper authorities of the Interior Department have accepted the proof and issued a final receipt to that effect, it operates to transfer such an equitable estate in the lands to the purchaser and settler as to immediately render the land liable to taxation although the legal title is still held by the United States.

4. The general rule which has been applied to the taxation of a homestead, preemption, and other lands acquired from the United States under the public land laws, is applicable to the case of lands acquired under the Carey Act.

Appeal from the District Court of the Sixth Judicial District for Bingham County—Hon. James M. Stevens, Judge.

Action to Enjoin the Collection of Taxes Levied against Certain Lands.

Judgment for the Defendant. Plaintiff Appeals. Affirmed.

W. H. Wilkins and William A. Lee for appellant.

J. E. Good, county attorney, and Hansbrough & Gagon for respondent.

44 AILSHIE, *C. J.*:

This action involves the right of the county to collect taxes against lands taken under what is commonly known as the Carey Act. Under the provisions of the Carey act (28 Stat. at Large, p. 422, 6 Fed. Stat., Anno., p. 397), the Secretary of the Interior, with the approval of the President, was authorized to contract with a state wherein desert land was situated, binding the United States to donate and patent to the state free of costs such desert lands not exceeding one million acres within the state as the state might cause to be "irrigated, reclaimed, occupied, and not less than twenty acres of each 160-acre tract, cultivated by actual settlers within ten years next after the passage of the act," etc. It was further provided by that act that "as fast as any state may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, re-

claimed and occupied by actual settlers, patents shall be issued to the state or its assigns for said lands so reclaimed and settled; providing that said states shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus money derived by any state from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such state." By a subsequent act (29 Stat. at Large, 434, 6 Fed. Stat., Anno., p. 398) the state was authorized to create a lien on such lands "for the actual cost and necessary expense of reclamation" but for no other purpose.

In pursuance of the provisions of the Carey Act, the
45 legislature enacted chap. 5, title 9 of the Revised Codes of this state, comprising secs. 1613 to 1634, inclusive, accepting the provisions of the act of Congress and providing for the state entering into contracts with individuals, associations or corporations, for the construction of irrigation works, and providing the means for reclaiming desert land within the purview and intention of the Carey Act. Under and in pursuance of the provisions of the Carey Act, and chap. 5, title 9 of the Rev. Codes of this state, and on the 19th day of July, 1899, the governor of Idaho entered into an agreement with the Secretary of the Interior for the withdrawal of a tract of land aggregating about 50,000 acres of which the parcel of land taxed in this case was a part. The state thereafter entered into a contract with the American Falls Canal and Power Co., a corporation, existing under the laws of the state of Utah, by which this corporation contracted and agreed to construct a canal from a point on Snake river through this tract of land for the purpose of irrigating and reclaiming the same. The canal company thereafter constructed a canal known as the American Falls Canal and represented that the canal was completed and that water had been furnished for the irrigation and reclamation of the greater part of the lands segregated, including the land belonging to the appellant herein. Upon this representation being made to the state board of land commissioners and the board being satisfied with such representation, application was made by the state to the Secretary of the Interior for the issuance of patent to the state for the lands described in the previous contract of segregation. In support of this application the state offered evidence of the irrigation and reclamation of the lands described in the list and of the completion
46 of the canal system as required by law. The Secretary of the Interior held that these proofs were insufficient and that sufficient water had not been provided for reclamation of these lands, and accordingly rejected the proofs and denied the application for patent and so notifified the state, and also advised the state that the segregation would be forfeited and all of the tract of land would be restored to the public domain, for the reason, as alleged by the Secretary, that the state had not complied with its contract in the matter of reclamation of the lands. Thereupon the state asked leave to renew its application for patent and submitted further proofs showing that additional work had been done toward increasing the capac-

ity of the canal and ditches, and securing a more ample supply of water. The Secretary of the Interior thereafter heard and considered this application, and on December 21, 1910, took favorable action thereon and clear-listed the entire tract of something like 50,000 acres, and on the latter date the Secretary directed the issuance of patent from the United States to the State of Idaho. In accordance with this order, patent thereafter and on January 9, 1911, issued from the United States to the State of Idaho for something like 50,000 acres embracing the tract of land in question. Appellant entered upon this land under a contract from the state, as required by the state law and the rules and regulations of the state board of land commissioners, and subsequently improved and reclaimed the land, in accordance with the laws of the state and the rules and regulations of the land board and paid to the state the required purchase price authorized under the act of Congress and the state statute. Thereafter and on June 25, 1909, appellant made all proofs of settlement, improvement and residence, as required
47 by law and the rules and regulations of the state board of land commissioners, and received a final certificate to that effect, signed by the register of the land board under the seal of the board. Nothing further was left for the entryman, appellant, to do in compliance with the act of Congress and the statutes of the state in order to entitle him to patent for this tract of land, and nothing further was done by him in the way of making further or other proof, and thereafter and on the 10th day of February, 1911, the state issued to him its patent for this land. The assessor of Bingham county, the county within which this land is situated, assessed the land as belonging to the appellant for state and county purposes for the year 1911, and this action was instituted for the purpose of enjoining the collection of such tax, on the ground that the land was not taxable for that year.

Under the statute of this state, sec. 1653, Rev. Codes, a tax lien attached against all taxable property within the state at noon, the second Monday in January, 1911. The second Monday of January, 1911, was January 9th, and this is the same day on which the patent from the United States to the State of Idaho issued for this body of land. On that day the legal title passed from the United States to the State of Idaho and was held in trust by the State of Idaho for the use and benefit of the settlers on the several tracts of land or those who might subsequently settle thereon and comply with the law in the matter of settlement, cultivation and reclamation. On that day the equitable title to this land was in the appellant, for the reason that he had then complied with all the requirements of the statutes, both state and federal, with reference to acquiring title to such lands. He had made his proofs and
48 received a final receipt, certifying to such fact, which receipt was approved by the state board of land commissioners. On January 9, 1911, the day on which this tax attached as a lien, nothing remained to perfect the appellant's title to the land except the issuance of patent by the United States to the State of Idaho, and the

issuance of patent by the state of Idaho to the appellant. On that day patent did issue from the United States to the state.

The rule which has been generally recognized by the courts with reference to the taxation of lands for which patent has not yet issued is, that when payment in full has been made and settlement and improvement have been had and final proof thereof has been made and the proper authorities of the Interior Department have accepted the proofs and issued a final receipt to that effect, it operates to transfer such an equitable estate in the lands as to immediately render the land liable to taxation, although the legal title is still held by the United States. (Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664; Kansas-Pacific Ry. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; U. S. v. Southern Oregon Co., 196 Fed. 423; Johnson v. Crook County, 100 Pac. 294; Mariner v. Oconto Land Co., 126 N. W. 34). No case has been called to our attention and, so far as we are advised, there is no case reported dealing with the question of taxation of lands segregated under the Carey Act. It seems to us, however, that the general rule which has been applied to the taxation of homesteads, preemptions, timber claims and other lands acquired from the United States under the public land laws is applicable to the case at bar. In this kind of case, the passing of title is a little more complicated, but we fail to see wherein that question can affect the purchaser's title or the right of the state to tax the land as
49 soon as title has been earned by the settler and purchaser.

Under the Carey Act, the United States deals directly with the state and issues its patent to the state rather than dealing with each individual settler on the minor subdivisions, and the state acts as trustee for the purpose of taking proofs and determining their sufficiency and passing title to the settler. The presumption is that the state will require such proofs as comply with both the act of Congress and the statutes of the state. The acceptance of proof and the issuance of a final receipt by the state board of land commissioners raises the presumption and indeed constitutes proof as against the owner for taxing purposes that the settler and claimant has complied with the law and earned the title to the land. If the homestead of a man who has received only a final receiver's receipt for the same is immediately taxable, certainly the Carey Act settler who has received from the state a final receipt and has paid the purchase price is liable to have his land immediately taxed as the equitable owner thereof.

Mariner v. Oconto Land Co., 126 N. W. 34, is somewhat in point here, for the reason that it deals with the passing of title through the medium of the state as a trustee for a special use. The holding of the court is set forth in the third paragraph of the syllabus as follows:

"Title to public land granted to the state for a particular purpose, and regranted by the state for the purpose of the trust, passes to the grantee as soon as it is earned, and that fact is duly determined, and from such date the lands are subject to the taxing laws of the state, whether the legal title shall have in form passed by the patent from the state or general government or not."

In United States v. Southern Oregon Co., 196 Fed. 423,
50 Judge Wolverton, in considering the right of certain counties to collect a tax on lands granted for state wagon road purposes said:

"Where, however, the government has parted with title to its lands by patent, the case would be an exceptional one where such lands were not taxable to the holder of the title under the patent. At least the taxes could not be avoided on the ground that the title was in the United States. Even under an exception to the general rule, the possession of the legal title by the government does not determine the fact and the right of ownership.

"The exception is where Congress has prescribed the conditions upon which portions of the domain may be alienated, and provided that, upon the performance of the conditions, a patent shall issue to the purchaser. When all such conditions are complied with, the land alienated being distinctly defined and it only remaining for the government to issue its patent, the purchaser becomes the equitable, and will be treated as the beneficial, owner of the land, and the government will be regarded as holding merely the legal title. In such a case the land is taxable by state authority to the purchaser, notwithstanding the legal title yet rests with the government."

A similar position was taken by the Supreme Court of Oregon in Johnson v. Crook County, 100 Pac. 294.

The fact that the government might prior to passing of title from the state to the settler revoke its patent to the state or institute proceedings for its cancellation can make no difference with the question before us. The government may, and frequently does cause the cancellation of patents to homesteads and timber claims, but the
51 fact that these things sometime happen does not affect the right of the state to tax the land as soon as title passes. The effect a subsequent cancellation has on the particular tract and the state's right to thereafter sell that tract for such tax is another question and is one with which we are not here confronted.

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan and Stewart, JJ., concur.

52 In the Supreme Court of the State of Idaho.

GLENN R. BOTHWELL, Appellant,

vs.

BINGHAM COUNTY, State of Idaho, and HEBER C. C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, Idaho, Respondents.

Stipulation for Diminution of the Record.

Whereas it appears from the transcript on appeal in the said cause from the District Court of the Sixth Judicial District of Idaho, in and for Bingham County, that upon the first page at folio 1, the name of the defendant, Bingham County, Idaho, has been inad-

vertently, and by excusable neglect, omitted from the title of said cause.

And whereas plaintiff and appellant is about to apply to said court by petition in error for a writ of error to the Supreme Court of the United States, and to apply to the Clerk of said Court for a certified copy of said record, and all parties to said action desiring that said record shall exemplify the true facts, it is hereby stipulated and agreed that said Court, or any Judge thereof, may direct that said error be corrected, and that the name of the defendant, Bingham County, Idaho, be added to the title of said cause in the caption, as the same appears on page 1 of said transcript.

Dated at Blackfoot, Idaho, this the 13th day of August, 1913.

WILLIAM A. LEE,
W. H. WILKINS,
Attorneys for Plaintiff.
J. E. GOOD,
Attorneys for Defendant.

53 STATE OF IDAHO,
County of Bingham, ss:

I, J. T. Carruth, Clerk of the District Court of Bingham County, Idaho, hereby certify that my attention has been directed to the transcript on appeal in the above entitled cause, and particularly to the omission of the first named defendant, to-wit: Bingham County, Idaho, at page 1 of said transcript, and that the omission of the name of said defendant was by inadvertence and oversight, and that said Bingham County, Idaho, is named as the first party defendant in the caption of the amended complaint in said action.

[SEAL.] J. T. CARRUTH,
Clerk of said Court.

Dated at Blackfoot, Idaho, this the 13th day of August, 1913.

54 In the Supreme Court of the State of Idaho.

GLENN R. BOTHWELL, Appellant,
vs.
BINGHAM COUNTY, State of Idaho, and HEBER C. C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, Idaho, Respondents.

Order.

Let the transcript on appeal, in the above cause, be amended by adding to the title, at Page 1, Folio 1, the name of the omitted defendant "Bingham County, State of Idaho, as per the stipulation of parties, and certificate of the Clerk of the lower court, made under date of August 13, 1913, and filed in this court.

Dated this the 30th day of August, 1913.

J. F. AILSHIE,
Chief Justice of the Supreme Court.

Endorsed: Filed August 30th, 1913. I. W. Hart, Clerk.

55 In the Supreme Court of the State of Idaho.

GLENN R. BOTHWELL, Appellant,
vs.
BINGHAM COUNTY, State of Idaho, and HEBER C. C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, State of Idaho, Respondents.

Clerk's Certificate.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing are full and true copies of the transcript on appeal from the lower court to this court, of the record entries, the opinion of the court, stipulation for diminution of the record and order for amendment of the record in the above entitled cause.

Witness my hand and the seal of the court this 12th day of September, 1913.

[Seal of Supreme Court, State of Idaho.]

I. W. HART
Clerk Supreme Court.

56 In the Supreme Court of the State of Idaho.

GLENN R. BOTHWELL, Plaintiff in Error,
vs.
BINGHAM COUNTY, State of Idaho, and HEBER C. C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, State of Idaho, Defendants in Error.

Petition, Assignment, and Prayer.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court of the State of Idaho in rendering judgment against him in the above entitled cause, the plaintiff hereby prays a writ of error, from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a cost bond.

Assignment of Errors.

And the said Plaintiff in Error, Glenn R Bothwell, assigns the following errors in the record and proceedings of said cause:

The Supreme Court of Idaho erred in holding and deciding:

First. That the judgment and decree of said District Court be affirmed in which and by which it was held and decided that plaintiff's lands became liable for State, County and School taxes at noon

of January 9th, 1911; that such taxes were a valid first lien
57 against said lands after said time; that plaintiff's bill to enjoin and restrain their collection and a sale for the same, was without equity, and should be dismissed, and in dismissing plaintiff's bill, said Supreme Court should have reversed said judgment and decree of the lower Court.

Second. That the levy of taxes against said lands and sale of the same for said taxes did not violate Section 4 of an act of Congress, approved August 18th, 1894, entitled, "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30th, 1894, and for other purposes." (28 Stat. L. 422) (Fed. Stat. Anno. Vol. 6, 397) and the amendments thereto of June 11, 1896, (29 Stat. L. 434), and of March 3, 1901, (31 Stat. L. 1188), said acts of Congress being commonly known and designated as the "Carey Act."

Third. That Section 1653, Idaho Revised Codes, 1908, created a first lien for State, County and School taxes against said lands on January 9th, 1911, at noon of said day; and in not holding and deciding that such a construction would cause the State law to be in violation of said acts of Congress, and also of the 14 Amendment to the Constitution of the United States, and would be taking property without due process of law, and in violation of the terms of the grant of said lands to the State.

Fourth. That the State of Idaho may levy a tax or create a tax lien upon and against lands segregated to a State under the provisions of said Carey Act, while the title remains in the United States, or the State, in trust for actual settlers.

58 Fifth. That public lands of the United States segregated to a State, under the provisions of the Carey act, may be taxed by the State at any time after the settler on such lands has submitted proof, to the State, of his settlement and reclamation.

Sixth. That plaintiff in error was vested with a complete indefeasable title to said lands, immediately upon the submission and acceptance of his proof of settlement and reclamation to the State Land Board in June, 1909.

Seventh. That the taxing of said lands and the sale of the same under said tax lien does not impair the obligation of the State's contract with the United States, made on the 19th day of July, 1899, by which it obligated itself not to create any lien upon said lands, or to dispose of the same for any purpose, except to secure their reclamation, cultivation and settlement.

Eighth. That said Section 1653, as applied to this plaintiff, did not abridge the privileges and immunities of citizens or of this plaintiff, as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Ninth. That the acts of the defendants in taxing plaintiff's "Carey Act" lands was not a taking of plaintiff's property without due process of law, as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Tenth. That said Section 1653, as applied to this plaintiff, did

not impair the obligation of contracts, contrary to the provisions of Article 1, Section 10 of the Federal Constitution.

59 Eleventh. That plaintiff's lands were subject to an assessment and levy of taxes by the defendants for State, County and School purposes prior to the execution and delivery to plaintiff by the State of Idaho of a patent conveying said lands.

Prayer for Reversal.

For which errors the plaintiff in error, Glenn R. Bothwell, prays that the said judgment of the Supreme Court of the State of Idaho, dated the 21st day of May, 1913, be reversed and a judgment rendered in favor of the plaintiff and for costs.

WILLIAM A. LEE,
J. D. SKERN,
WILLIAM H. WILKINS,
CHARLES C. DEY,
Attorneys for Glenn R. Bothwell.

STATE OF IDAHO,
Supreme Court, ss:

Let a writ of error issue upon the execution of a bond for costs by Glenn R. Bothwell to Bingham County, State of Idaho, and Heber C. C. Rich, defendants in error, in the sum of $1000.00.

Dated at Boise, Idaho, on this 30th day of August, 1913.

J. F. AILSHIE,
Chief Justice of the Supreme Court of Idaho.

59½ [Endorsed:] No. 2211. In the Supreme Court of the State of Idaho. Glenn R. Bothwell, appellant, v. Bingham County et al., respondents. Petition, Assignment and Prayers. Filed this 23 day of Aug. 1913. I. W. Hart, Clerk.

60 In the Supreme Court of the State of Idaho.

GLENN R. BOTHWELL, Appellant.
vs.
BINGHAM COUNTY, State of Idaho, and HEBER C. C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, State of Idaho, Respondents.

Bond.

Know all men by these presents: That we, Glenn R. Bothwell, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the County of Bingham, State of Idaho, in the sum of one thousand ($1,000) dollars, to be paid to said county, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 4th day of September, 1913.

Whereas, the above named plaintiff in error seeks to prosecute

its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] GLENN R. BOTHWELL,
UNITED STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By HARRISON E. JENKINS,
Attorney-in-Fact.
McREYNOLDS & WHITSON,
By W. D. McREYNOLDS,
Resident Agents.

61 STATE OF UTAH,
City and County of Salt Lake, ss:

Harrison E. Jenkins being duly sworn, deposes and say-: That the United States Fidelity and Guaranty Company, the surety on the foregoing bond, is a corporation of the State of Maryland, duly and legally carrying on the business of a Surety Company in the State of Idaho. That said Surety Company has fully complied with the laws of the State of Idaho relating to foreign corporations doing business in said State. That affiant is attorney-in-fact of said Company. That said Surety Company is authorized by its articles of Incorporation and by-laws to execute the bond hereto annexed, and that said Company has assets, consisting of capital stock, paid-up cash and surplus, over and above all of its liabilities, exceeding the sum of one million, five hundred thousand dollars, and has on deposit with the Treasurer of the State of Maryland, in trust for the benefit of all bondholders, two hundred thousand dollars ($200,000) in available assets.

HARRISON E. JENKINS.

Subscribed and sworn to before me this 4th day of September, A. D. 1913.
My commission expires November 1, 1915.
[SEAL.] G. H. SCHETTLER,
Notary Public.

BOISE, IDAHO, Sept. 6, 1913.

The within and foregoing bond is hereby approved.

J. F. AILSHIE,
Chief Justice.

Endorsed: Filed Sept. 6, 1913. I. W. Hart, Clerk.

62 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Glenn R. Bothwell, Plaintiff, and Bingham County, State of Idaho, and Heber C. C. Rich, Assessor and Ex-officio Tax Collector of Bingham County, State of Idaho, Defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Glenn R. Bothwell, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and
63 speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 10th day of September, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON,
Clerk District Court United States, District of Idaho.

Allowed September 10th, 1913.

J. F. AILSHIE,
Chief Justice Supreme Court of Idaho.

[Endorsed:] No. 2211. In the Supreme Court of the State of Idaho. Glen R. Bothwell, Appellant, vs. Bingham County et al., Respondents. Writ of Error. Filed this 10" day Sept., 1913. I. W. Hart, by E. D. David, Deputy.

64 In the Supreme Court of the State of Idaho.

GLENN R. BOTHWELL, Plaintiff in Error,
vs.
BINGHAM COUNTY, State of Idaho, and HEBER C. C. RICH, Assessor and ex-Officio Tax Collector of Bingham County, Idaho, Defendants in Error.

Certificate of Lodgment.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, hereby certify that the original of the foregoing petition, assignment and prayer was lodged with me, as such clerk, on the 23d day of August, 1913, and the following endorsement made thereon: Petition, Assignment and Prayer, Filed this 23d day of Aug., 1913. I W. Hart, Clerk.

That the original of the foregoing bond was lodged with me as such clerk on the 6th day of September, 1913, and the following endorsement made thereon: Bond. Filed this 6th day of Sept., 1913. I. W. Hart, Clerk.

That the foregoing original Writ of Error was lodged with me as such clerk on the 10th day of September, 1913, and the following endorsement made thereon: Writ of Error. Filed this 10th day of Sept., 1913. I. W. Hart, Clerk. By E. S. David, Deputy; and that copies thereof were lodged with me for each one of the defendants.

In witness whereof, I have hereunto set my hand and affixed the seal of the court, this 12th day of September, 1913.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court, State of Idaho.

65 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Bingham County, State of Idaho, and Heber C. C. Rich, Assessor and ex-Officio Tax Colletor of Bingham County, State of Idaho, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Idaho, wherein Glenn R. Bothwell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Chief Justice of the Supreme Court of the State of Idaho, this 10th day of September, 1913.

[Seal of Supreme Court, State of Idaho.]

J. F. AILSHIE,
Chief Justice Supreme Court of Idaho.

Attest:
I. W. HART,
Clerk Supreme Court of Idaho.

66 I, the attorney of record for the defendants in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

Done at Blackfoot, Bingham County, Idaho, this the 10th day of September, 1913.

JAMES E. GOOD,
Attorney for Bingham County, State of Idaho, and Heber C. C. Rich, Assessor and ex-Officio Tax Collector of Bingham County, State of Idaho.

[Endorsed:] No. 2211. In the Supreme Court of the State of Idaho. Glenn R. Bothwell, Appellant, vs. Bingham County et al., Respondents. Citation. Filed this 10th day of Sept., 1913. I. W. Hart, Clerk, by E. D. David, Deputy.

67 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Boise, this September 15th, 1913.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

Costs of Suit.

Plaintiffs' Costs, $11, paid by Glenn R. Bothwell.
Defendants' Costs, $3, paid by Bingham County et al.
Costs of Transcript, $35, paid by Glenn R. Bothwell.

I. W. HART,
Clerk Sup. Ct., Idaho.

Endorsed on cover: File No. 23,877. Idaho Supreme Court. Term No. 266. Glenn R. Bothwell, plaintiff in error, vs. Bingham County, State of Idaho, and Heber C. C. Rich, Assessor and ex-Officio Tax Collector of Bingham County, State of Idaho. Filed October 2d, 1913. File No. 23,877.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 266.

GLENN R. BOTHWELL, PLAINTIFF IN ERROR,

vs.

BINGHAM COUNTY, STATE OF IDAHO; HEBER C. C. RICH, ASSESSOR AND EX OFFICIO TAX COLLECTOR FOR BINGHAM COUNTY, STATE OF IDAHO, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

SUPPLEMENTAL BRIEF.

Plaintiff in error asks leave of the court to file the following supplemental brief and additional list of authorities.

Defendants in error suggest that plaintiff is estopped from challenging the sufficiency of the proof of settlement and reclamation made by him to the agent of the State Land Board in May, 1909, and in support of such contention cites a number of the decisions of this court, which announced the well-settled doctrine that:

> "One who by his acts or representations, or by his silence when he ought to speak intends or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such belief so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped from interposing such denial."

This principle of law has no application to the facts of this case, because plaintiff in error, in submitting his proof of settlement and reclamation in May, 1909, was only doing what the State statute and the rules and regulations of the State Land Board required him to do in order to maintain his standing as a Carey entryman.

Section 19 of the act entitled, "An Act to Provide for a State Engineer, etc., and to Provide for the Acceptance by the State of Idaho from the United States of Certain Lands, and to Provide for the Reclamation, Occupation, and Disposal of the Same," approved March 2, 1899 (sec. 1628, Revised Code of 1908), *inter alia,* it provides:

> "Within one year after any person, association, or incorporated company authorized to construct irrigation works under the provisions of this act shall have notified the settlers under such works that they are prepared to furnish water under the terms of their contract with the State, the said settler shall cultivate and reclaim not less than 1/16 part of the land filed upon, and within two years after the said notice the settler shall have actually irrigated and cultivated not less than ⅛ of the land filed upon, and within three years from the date of said notice the settler shall appear before the secretary of the board, a judge or clerk of the District Court or United States Circuit Court or Commissioner to be designated by the board within the State and make final proof of reclamation, settlement, or occupation, which proof shall embrace evidence that he is the owner of shares in the works which entitle him to a water right for his entire tract of land sufficient in volume for the

complete irrigation and reclamation thereof, that he has been an actual settler thereon and has cultivated and irrigated not less than ⅛ part of said contract; and such further proof, if any, as may be required by the regulations of the Department of the Interior and the board. The officer taking this proof shall be entitled to receive a fee of two dollars, which fee shall be paid by the settler and shall be in addition to the price paid to the State for the land. All proofs so received shall be submitted by the secretary of the board, and shall be accompanied by the last and final payment for said land and upon approval of the same by the board they shall be forwarded to the Secretary of the Interior with a request that a patent to said lands be issued to the State," etc.

It will be observed that these State regulations required plaintiff to submit this proof some eighteen months before the State had caused an ample supply of water to be furnished in a substantial ditch or canal for the reclamation of these lands, but plaintiff could not be held for any default of the State or its construction company, in not having provided this ample supply of water, when it required him to make this proof.

"The mere fact that a complainant accepted and recorded a deed purporting to convey to it lands, the legal and equitable title to which were both, in fact, in the United States, does not estop it to maintain a suit in equity to enjoin the collection of taxes levied on said lands by the taxing officers of the county."

Clearwater Timber Co. *vs.* Nez Perce County, 155 Fed., 633, U. S. Circuit Court, District of Idaho, decided July 1, 1907.

Clearwater Timber Co. *vs.* Sho Shone County, 155 Fed., 612.

II.

The State Supreme Court (Tr., 27) has construed section 1653 of the Revised Code of Idaho as fixing the time at which a tax lien attaches against all taxable property within the State as noon of the second Monday in January of each year. The United States Circuit Court for the District of Idaho, in a recent decision, gives this section the same construction. It says:

> "Under such statutes, the status of property within the State for purposes of taxation is fixed on the second Monday in January, and that real estate exempt from taxation on the second Monday of January of any given year does not become subject to taxation during that year even though transferred to a person in whose hands it is no longer exempt under the law."
>
> Clearwater Timber Co. *vs.* Nez Perce County, 155 Fed., 633.

III.

In Wisconsin Central R. Co. *vs.* Price Co., 133 U. S., 496; 33 L. Ed., 687, Mr. Justice Field, speaking for the court, says:

> "When the Government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser and it does not exclude him from the use of the property, then the donee or purchaser will be treated as the beneficial owner of the land and the same shall be held subject to taxation as his property."

In Sioux City & St. P. R. Co. *vs.* The United States, 159 U. S., 349; 40 L. Ed., 177, Mr. Justice Harlan, speaking for the court, at page 364, said:

> "Another contention is that upon the issuing of the patents of 1872 and 1873 to the State for the use and benefit of the railroad company, the title vested absolutely in the company, and the lands were thereby freed from restraint or alienation from conditions subsequent or from liability to forfeiture."

In referring to the Price County case, *supra*, the court further says:

> "But these are cases, as an examination of them will show, in which the grant was directly to the railroad company or in which the act of Congress required that the patents for lands earned should be issued not to the State for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issued to the State for the benefit of the company, *so that until the State disposed of lands the title was in it as trustee and not in the railroad company.*"

Among other cases, the opinion refers to Sioux City & St. P. R. Co. *vs.* Osceola County, 43 Iowa, 318, and continues:

> "In the case last mentioned the Sioux City company was relieved from the payment of taxes upon some of the lands patented to the State for its benefit upon the ground that the legal title was in the State, and the lands, for that reason, were not taxable."

It has been held in many cases that, where lands have been granted by Congress to the State to aid in the construction of internal improvements, with conditions annexed to the grant, that the issuance of patent by the State is the only competent evidence that the lands have been earned, and that such lands are not taxable until such patents have been issued.

> Iowa Falls & Sioux City R. Co. *vs.* Cherokee County, 37 Iowa, 438.

In Rice *vs.* The Minnesota & Northwestern R. R. Co., 1 Black, 358; 17 L. Ed., 147, it is held that:

> "Where Congress grants land to a State to be used in aiding the construction of an internal improvement a trust of power to dispose of the land for the purpose of carrying out the improvement is granted and no beneficial interest passes to the State."

To the same effect is

U. S. *vs.* Michigan, 190 U. S., 279; 47 L. Ed., 1103.

> "No taxes can be imposed upon the lands while they remain the property of the United States, nor upon lands granted by the United States to the State in trust for works of internal improvement and as to which the trust has not been executed."
>
> Central R. R. *vs.* Taylor County, 52 Wis., 37; 8th N. W., 833.

The rule with regard to when the Government has so far divested itself of title to public lands as to render them taxable has been frequently announced and applied in many of the State and Federal courts, and may be stated thus:

> "Before land granted or sold by the United States can be taxed by the State or other local taxing body as the property of the beneficial owner * * * a perfect equitable title must be vested and the consideration and other conditions of the grant or sale fully paid and performed. As long as the Government retains the legal title as security for any part of the purchase money or to secure the performance of other conditions of the grant or sale the land is not subject to taxation."
>
> Pitts *vs.* Clay, 27 Fed., 635.
>
> United States *vs.* Milwaukee, 100 Fed., 828.
>
> Clearwater Timber Co. *vs.* Shone County, 155 Fed., 612.

Mr. Justice Miller states the rule thus:

> "While we recognize the doctrine laid down by this court that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the right to the patent is complete and the equitable title is fully vested in the party without anything more to be paid or any act to be done going to the foundation of his right."
>
> Kansas P. R. Co. *vs.* Prescott, 16 Wall., 603; 21 L. Ed., 373.

To the same effect are the following:

Union R. R. Co. *vs.* McShane, 22 Wall., 444; 22 L. Ed., 747.

Central Colorado Improvement Co. *vs.* Pueblo County, 95 U. S., 259; 24 L. Ed., 495.

Northern P. R. Co. *vs.* Traill County, 115 U. S., 600; 29 L. Ed., 477.

In State *vs.* Itasca Lumber Co., 100 Minn., 355; 111 N. W., 276, the rule is stated thus:

> "When the Government has no longer any right or interest in the property which would justify it in withholding the patent and the purchaser is in possession the latter will be treated as the beneficial owner * * * but before the land can be taxed by the State as the property of the beneficial owner a perfect equitable title must be vested and the consideration fully paid to the United States."

Under the laws of Idaho, as construed by numerous decisions of the Supreme Court of that State, public lands cannot be taxed while the title of the same remains vested in the State.

Article 7, section 4, of the State Constitution, provides:

> "The property of the United States, the State, counties, towns, cities, and other municipal corporations and public libraries shall be exempt from taxation."

"Lands belonging to the State are exempt from taxation and no title can be acquired to the same by a tax deed."

State *vs.* Stevenson, 6th Idaho, 367; 55 Pac., 886.

"Primarily title to all land in this country is in the Government, and until the Government has parted with the title it remains the property of the United States and as such is not subject to taxation."

Lane *vs.* Salisbury, 7th Idaho, 373; 63 Pac., 383.

"It must be considered that lands belonging to the Government are not assessable to any one so long as the title remains in the United States."

Inland Lumber Co. *vs.* Thompson, 11th Idaho, 522; 83 Pac., 933.

The findings of the Secretary of the Interior some eighteen months after the State had issued to plaintiff in error this instrument, which it termed final receipt, that the State had not complied with its contract and had not provided an ample supply of water in a substantial ditch or canal to reclaim these lands, is a final and conclusive judgment that the lands had not been reclaimed and that the recitals in the receipt to the effect that they had been, were untrue.

The subsequent completion of the works and the furnishing of an ample supply of water for their reclamation late in 1910 could not relate back to this certificate and make it effective for any purpose.

Hussmon *vs.* Durham, 165 U. S., 144; 41 L. Ed., 644.

State *vs.* Itasca Lumber Co., 100 Minn., 355.

The grant of lands made by Congress to the State was in trust for a specific purpose. By its terms the State was not authorized to lease said lands or otherwise dispose of them in any way whatever, except to secure their reclamation, cultivation, and settlement.

A lien was authorized to be created by the State, and by no other authority whatever, for the actual cost and necessary expense of reclamation and interest on such cost. The authority to create this lien necessarily implies that the State was prohibited from creating any other kind of a lien.

The time given the State for the execution of this trust was limited to ten years, after which the Secretary of the Interior was given discretionary power to extend for a period of five years by the act of March 3, 1901.

The lands were not reclaimed within the ten-year period given, and the entire segregation was subject to restoration at the time application for patent was made, late in December, 1910.

No proof of settlement or occupancy was ever made to the Government.

The proceeds derived by the State from the sale of these lands above the cost was to be a trust fund for the reclamation of other lands. No attempt to comply with this provision of the grant has ever been made.

The contract of segregation expressly provides that all of these lands are subject to contest by any person and in any United States land office where they may be situate at any time before the State has finally disposed of the same, upon the ground that such lands are not arid in character.

We respectfully submit that in view of all of the conditions in the grant that the State could not invest the plaintiff in error with a perfect indefeasible title to any of the lands in said grant, a title so perfect that nothing remained to be done, going to the foundation of plaintiff's interest, until the State had fully executed its trust by patenting these lands to the plaintiff, and that these lands were not subject to taxation by the State or any of its subdivisions on January 9, 1911.

Respectfully submitted by

WILLIAM A. LEE,
Attorney for Plaintiff in Error.

Residence, Blackfoot, Idaho.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 266

GLEN R. BOTHWELL, PLAINTIFF IN ERROR,

vs.

BINGHAM COUNTY, STATE OF IDAHO; HEBER C. C. RICH, ASSESSOR AND EX-OFFICIO TAX COLLECTOR FOR BINGHAM COUNTY, STATE OF IDAHO.

In Error to the Supreme Court of the State of Idaho.

BRIEF FOR PLAINTIFF IN ERROR.

J. D. SKEEN,
WILLIAM H. WILKINS,
Residence: Salt Lake City, Utah.

WILLIAM A. LEE,
Residence: Blackfoot, Idaho.
Attorneys for Plaintiff in Error.

EDWARD B. CRITCHLOW,
Of Counsel. Residence: Salt Lake City, Utah.

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STATEMENT.

This action was commenced in the District Court for Bingham County, State of Idaho, to restrain the collection of state and county taxes levied upon land prior to the issuance of patent to the plaintiff in error. The case was submitted upon an agreed statement of facts, which the trial court adopted as its findings. Judgment was entered in favor of the defendants and against the plaintiff, holding the land subject to taxation and the tax lien valid. (Tr. 1-20.) Upon appeal to the Supreme Court of the State of Idaho, the judgment below was affirmed, and the case is brought here upon writ of error. (Tr. 24.) The premises in question are embraced within a tract of approximately fifty thousand acres of land, segregated by the United States under the provisions of the acts of Congress, commonly known as the "Carey Act." 28 Stat. L. 422, 6 Fed. Stat. Ann. 397-399, and the acts amendatory thereof, 29 Stat. L. 434, 31 Stat. L. 1188, and Chapter 5, Title 9, of the Idaho Revised Codes, 1907, accepting the conditions of such acts of Congress, and the various contracts made pursuant to said statutes. (Tr. 1-4.) The jurisdiction of this court is predicated upon Section 237 of the Judicial Code. The judgment of the highest court of the State denied rights claimed under the following Federal Statutes:

> Sec. 4. (Grant to States irrigating desert lands.) That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State, to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the Act entitled "An Act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven and the act amendatory thereof approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the pas-

sage of this Act, as thoroughly as is required of citizens who may enter upon the said desert land law. (28 Stat. L. 422.)

(Plan of irrigation to be filed—contracts for reclaiming and settlement.) Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement. (28 Stat. L. 422.)

(Patents for reclaimed land—limit to one person—surplus from sale.) As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: Provided, That said States shall not sell or dispose of more than one hundred and sixty acres of land to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. (28 Stat. L. 422.)

Sec. 1. (Lien for expenses of reclaiming lands—patents to issue when.) That under any law heretofore or

hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an Act entitled "An Act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: Provided, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part. (29 Stat. L. 434.)

That portion of the Idaho law accepting the conditional grants, bearing upon the questions presented by the record in this case, is as follows:

> Sec. 1613. The State of Idaho hereby accepts the conditions of Section 4 of an act of Congress, entitled, "An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes," approved August 18, A. D. 1894, together with all the grants of land to the State under the provisions of the aforesaid act. The selection, management and disposal of said land shall be vested in the State Board of Land Commissioners, as constituted by Section 7 of Article 9 of the Constitution of the State of Idaho. Said State Board of Land Commissioners shall be hereinafter designated as the "board."

Pursuant to these statutes, the United States and the State of Idaho entered into a contract for the segregation of approximately fifty thousand acres of land. The contract appears as one of the allegations in the complaint, but because

of its direct bearing upon the questions presented, and for the convenience of the court, we set it out in full.

These Articles of Agreement, made and entered into this 19th day of July, A. D. 1899, by and between E. A. Hitchcock, Secretary of the Interior, for and on behalf of the United States of America, party of the first part, and Frank Steunenberg, for and on behalf of the State of Idaho, party of the second part, witnesseth:

That in consideration of the stipulations and agreements hereinafter named, and of the fact that the State has, under the provisions of Section 4 of Act of Congress, approved August 18th, 1894, through Frank Steunenberg, its proper officer, thereunto duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character, and particularly described as follows, to-wit:

Herein follows a description of the segregation by legal subdivisions and includes a total of 51,178.45 acres, in which list of lands is included, the Northwest Quarter of the SE¼ and the NE¼ of the SW¼ and Lot 4, being the SW¼ of the SW¼ and SE¼ of the SW¼ of Section 18, Twp. 4 S, R. 33 E., B. M., being the land of plaintiff hereinafter described, and after said description of land said contract continues as follows:

"And has filed a map of said lands, and exhibited a plan showing the mode by which it is proposed that said lands shall be irrigated and reclaimed, and the source of water to be used for that purpose, the said party of the first part contracts and agrees, and by and with the consent and approval of William McKinley, President thereof, hereby binds the United States of America, to donate, grant and patent to said State, or to its assigns, free from cost for survey and price, such parts of said lands as said State or its assigns may cause to be irrigated, reclaimed, occupied and cultivated, in accordance with the provisions of said Act of Congress, and with the regulations issued thereunder and with the terms of this contract, any time prior to the 18th day of August, 1904.

It is further understood, that said State shall not lease any of said lands or use or dispose of the same in any way whatever except to secure their reclamation, cultivation and settlement; and in the selling and disposing of them for that purpose, the said State may sell or dispose of not more than 160 acres to any one person and

then only to bona fide settlers who are citizens of the United States, or who have declared their intention to become such citizens, and it is distinctly understood and fully agreed that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said Act of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands.

It is further understood and agreed, that said State shall have full power, right and authority to enact such laws, and from time to time to make and enter into such contracts and agreements, and to create and assume such obligations in relation to and concerning said lands as may be necessary to induce and cause such irrigation, reclamation, settlement and cultivation thereof as is required by this contract and the said Act of Congress; but no such law, contract or obligation shall in any way bind or obligate the United States to do or perform any act not clearly directed and set forth in this contract and said Act of Congress, and then only after the requirements of said Act and contract have been fully complied with.

Neither the approval of said application, map and plan, nor the segregation of said land, by the Secretary of the Interior, nor anything in this contract, or in the said Act of Congress, shall be construed as to give said State any interest whatever in any lands upon which there may, at the date of this contract, be an actual settlement by a bona fide settler, qualified under the public land laws to acquire title thereto; nor to any lands which are, in fact, non-desert in character, and not subject to entry under the desert land laws of the United States; and any person may at any time before said State shall have finally disposed of the same, institute a contest before the register and receiver of the district in which said land is situated, upon an allegation that any quarter section of said land is non-desert in character.

It is further understood and agreed, that as soon as any of said lands may be irrigated and reclaimed as thoroughly as is now required of citizens to enter lands under the desert land laws, and are occupied by actual bona fide settlers, who have cultivated twenty acres of the tracts upon which they have settled, the said State or its assigns

may make proof thereof under and according to such rules and regulations as may be prescribed thereof by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory, the patent shall issue to said State or its assigns, for the tracts included in said proof.

The said State shall, out of the money arising from its disposal of said lands, first reimburse itself for any and all costs and expenditures incurred by it in irrigating and reclaiming said lands, or in assisting its assigns in so doing, and any surplus then remaining after the payment of the costs of such reclamation, shall be held as a trust fund to be applied under the direction of the Secretary of the Interior to the reclamation of other desert lands within said State.

The said second party agrees that an accurate account shall be kept of all moneys received by said State from the sale of said lands, and of the money expended by it in the reclamation thereof, and shall from time to time render an accurate statement thereof to the Secretary of the Interior, whenever required by him so to do.

And it is further stipulated, that as soon as said surplus shall have been ascertained, and the amount of said trust fund finally declared, it shall be deposited by the said State in some United States Depository, where it shall remain until it shall be withdrawn for the purpose of reclaiming other lands, as hereinbefore provided.

This contract is executed in duplicate, one copy of which shall be placed of record and remain on file with the Commissioners of the General Land Office and the other shall be placed of record and remain on file with the proper officers of said State, and it shall be the duty of said State to cause a copy thereof, together with a copy of all rules and regulations issued thereunder, or under said Act of Congress, to be spread upon the deed records of each of the counties of said State in which any of said lands shall be situated.

In testimony whereof, the said parties have hereunto set their hands, the day and year first above written.

E. A. HITCHCOCK,
Secretary of the Interior.
STATE OF IDAHO,
By FRANK STEUNENBERG,
Governor and Chairman State Board Land Commissioners."

On the 23rd day of February, 1901, the State of Idaho entered into a contract with the American Falls Canal & Power Company for the construction of the canal system proposed for the irrigation of the lands segregated, and in consideration of the construction of the canal system, it authorized the American Falls Canal & Power Company to sell water rights in the canal system for the irrigation of the segregated lands.

Prior to May 15th, 1909, plaintiff in error, being a qualified Carey entryman, made settlement upon a part of the segregated lands, particularly described in the complaint, and at the same time entered into a contract for the purchase from the American Falls Canal & Power Company of water rights sufficient for the irrigation of the land entered. On May 15th, 1909, plaintiff submitted evidence of the cultivation and irrigation of the land entered to one Lorenzo R. Thomas, designated as "Agent of State Land Board," and on June 25th, 1909, plaintiff received the following certificate:

"Entry No. 311.

Blackfoot, Idaho, May 15, 1909.

It is hereby certified that under the provisions of an Act of the Legislature of the State of Idaho, approved March the 2nd, 1899, entitled an Act providing for a State Engineer and to provide for the acceptance by the State of Idaho, from the United States, of certain lands and to provide for the reclamation, occupation and disposal of the same, commonly known as the "Carey Act," and the Acts of the Legislature amendatory thereof, Glen R. Bothwell, whose post office address is Springfield, Idaho, before me on this 15th day of May, 1909, appeared and submitted evidence of the reclamation, cultivation and settlement of entry No. 311 embracing the NW¼ of the SE¼ and the NE¼ of the SW¼ and Lot 4, being the SW¼ of the SW¼ and the SE¼ of the SW¼ of Section 18, Twp. 4 S., R. 33 E., B. M., containing 150.64 acres, and has paid to the State of Idaho, through me, the sum of $40.00, being at the rate of twenty-five cents per acre, being in full payment of said land.

(Signed) LORENZO R. THOMAS,
Agent State Land Board."

"This is to certify that the reclamation, cultivation and settlement of the land embraced in entry No. 311 referred to in the above certificate has been examined and

has been hereby approved this 25th day of June, 1909, by order of the State Board of Land Commissioners.

(Signed) M. I. CHURCH, Register." (Tr. 6.)

After receiving the above certificate, plaintiff submitted no other proof and performed no act by way of making proofs to the Interior Department, or to its agent, or to any other person whatsoever, and neither the proof submitted on May 15th, 1909, nor any other proof of the irrigation or cultivation of the particular tract of land entered by him, was ever submitted by the State, or any of its officers or agents, or any other person, to the Interior Department, or to its officers or agents. (Tr. 14.)

In January, 1910, the State applied to the Interior Department for a patent to all the lands embraced in what was termed "Lists for Patent No. 5," which included the major portions of the lands in the segregation made by the Government to the State of Idaho July 19th, 1899. The State offered in support of said application for patent certain proofs that "an ample supply of water had been actually furnished in a substantial ditch or canal" to reclaim said lands. The Secretary of the Interior, after consideration, held the proofs offered on behalf of the State insufficient, rejected its application for patent, and at the same time notified the State that its contract of segregation with the United States would be cancelled, and that all lands embraced in said segregation, including the lands of the plaintiff in error, would be restored to the public domain for entry and settlement under the public land laws, because the State had not complied with its contract with the United States. (Tr. 15.)

In October, 1910, the State asked leave to renew its application for patent to said lands, and upon leave being granted submitted proof that it had done, or caused to be done, further and additional work; that it had taken further and additional action "to cause an ample supply of water in a canal or ditch" to be furnished for the reclamation of said lands, in accordance with the requirements of said Carey Act. The Secretary of the Interior received and examined proof in support of the proposition that the canal system had been properly constructed and an ample supply of water furnished, and on December 21st, 1910, clear-listed all of the lands embraced in said list for patent No. 5, comprising about forty-nine thousand acres. No proof was submitted to the Interior Department of

the cultivation, irrigation and settlement of any particular tracts of land covered by "Lists for Patent No. 5."

On January 9th, 1911, the United States issued its patent No. 168495 to the State for all of the lands embraced in said list. A large amount of the land included in the blanket patent had never been settled upon, occupied or cultivated by any settler. The patent was issued pursuant to the terms of the amendment to the Carey Act of June 11th, 1896, and the specific requirements of Section 4 of the original act, respecting the settlement by bona fide settlers and the irrigation and reclamation of the individual tracts, was wholly disregarded in issuing the patent.

The patent dated January 9th, 1911, was recorded in the General Land Office, transmitted to the State of Idaho, and received and recorded in Bingham County, January 18th, 1911. (Tr. 16.) On February 10th, 1911, the State executed its patent to plaintiff for the particular land entered by him and described in the certificate issued June 25th, 1909. (Tr. 17.)

The Supreme Court of Idaho, construing its tax law, in this case said: "Under the statute of this State, Section 1653, Revised Codes, a tax lien attaches against any taxable property within the State at noon the second Monday in January, 1911. The second Monday in January, 1911, was January 9th, and this is the same day which the patent from the United States to the State of Idaho issued for this body of land." (Tr. 27.)

At noon on the 9th day of January, 1911, the defendants in error attempted to assess plaintiff's land and to levy the taxes in question.

Plaintiff in error makes the following assignments:

ASSIGNMENTS OF ERROR.

The Supreme Court of Idaho erred in holding and deciding:

First: That the judgment and decree of said District Court be affirmed in which and by which it was held and decided that plaintiff's land became liable for state, county, and school taxes at noon of January 9th, 1911, that such taxes were a valid first lien against said lands after said time; that plaintiff's bill to enjoin and restrain their collection and a sale for the same, was without equity, and should be dismissed, and in dismissing plaintiff's bill; said Supreme Court should have reversed said judgment and decree of the lower court.

Second: That the levy of taxes against said lands and sale of the same for said taxes did not violate Section 4 of an Act of Congress, approved August 18th, 1894, entitled: "An Act making appropriations for sundry civil expenses for the government for the fiscal year ending June 30th, 1894, and for other purposes." (28 Stat. L. 422.) (Fed. Stat. Anno. Vol. 6, 397) and the amendments thereto of June 11th, 1896, 29 Stat. L. 434), and of March 3, 1901, (31 Stat. L. 1188), said acts of Congress being commonly known and designated as the "Carey Act."

Third: That Section 1653, Idaho Revised Codes, 1908, created a first lien for state, county and school taxes against said lands on January 9th, 1911, at noon of said day, and in not holding and deciding that such a construction would cause the state law to be in violation of said acts of Congress, and also of the 14th Amendment to the Constitution of the United States, and would be taking property without due process of law, and in violation of the terms of the grant of said lands to the state.

Fourth: That the State of Idaho may levy a tax or create a tax lien upon and against said lands segregated to a state under the provisions of said "Carey Act," while the title remains in the United States, or the state, in trust for actual settlers.

Fifth: That public lands of the United States segregated to a state, under the provisions of the "Carey Act," may be taxed by the state at any time after the settler on such lands has submitted proof, to the State, of his settlement and reclamation.

Sixth: That plaintiff in error was vested with a complete indefeasible title to said lands, immediately upon the submission and acceptance of his proof of settlement and reclamation to the State Land Board in June, 1909.

Seventh: That the taxing of said lands and the sale of the same under said tax lien does not impair the obligation of the State's contract with the United States, made on the 19th day of July, 1899, by which it obligated itself not to create any lien upon said lands, or to dispose of the same for any purpose, except, to secure their reclamation, cultivation and settlement.

Eighth: That said Section 1653, as applied to this plaintiff, did not abridge the privileges and immunities of citizens or of this plaintiff, as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Ninth: That the acts of the defendants in taxing plaintiff's "Carey Act" lands was not a taking of plaintiff's property without due process of law, as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Tenth: That Section 1653, as applied to this plaintiff, did not impair the obligation of contracts, contrary to the provisions of Article 1, Section 10 of the Federal Constitution.

Eleventh: That plaintiff's lands were subject to an assessment and levy of taxes by the defendants for state, county and school purposes prior to the execution and delivery to plaintiff by the State of Idaho of a patent conveying said lands.

ARGUMENT.

Section 4, Article 7, of the Constitution of the State of Idaho, provides: "That the property of the United States, the State, counties, towns, cities and other municipal corporations, and public libraries, shall be exempt from taxation." This constitutional provision but affirms the law of the United States.

McCullough vs. Maryland, 4 Wheat 316, 4 L. Ed. 579;
Van Brocklin vs. Anderson, 117 U. S. 151, 29 L. Ed. 845.

The principle is qualified, however, to the extent that where the United States holds only the naked legal title to the land and the full *equitable title has passed by the performance of every act going to the foundation of the right,* the land is subject to State taxation.

Kansas Pacific Railroad Co. vs. Prescott, 83 U. S. 603, 21 L. Ed. 373, 16 Wall. 603;
Union Pacific Railroad Co. vs. McShane, 89 U. S. 444, 22 L. Ed. 747, 22 Wall. 444;
Central Colorado Improvement Co. vs. Board of County Commissioners of Pueblo County, 95 U. S. 259, 24 L. Ed. 495;
Hussman vs. Durham, 165 U. S. 144, 41 L. Ed. 644.

It follows that if, as in this case, the United States conveys land to a State in trust for a specific purpose, something more than a mere naked title is retained until the trust is

fully executed by the trustee. Every act going to the foundation of the right is not performed until the trustee divests itself of the trust property, and in this case it could be done only by the issuance of patent.

In Tucker vs. Ferguson, 89 U. S. 572, 22 L. Ed. 805, Mr. Justice Swayne, delivering the opinion of the court, says:

> "The State accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The State did not in anywise abdicate her sovereignty by accepting the trust. But the former might be exercised to render more effectual the discharge of the latter. She was in nowise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be ultra vires and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further. Upon general principles she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the State, proceeding in the execution of the trust, had transferred her entire title to the company, and they had perfected their title and acquired the right to sell, the case assumed a very different aspect."

The issuance of the patent by the United States to the State of Idaho did not terminate the control over the land by the United States. By the terms of the grant its control was continued until actually disposed of by the issuance of the patents to the individual entrymen. While it continued to hold the title in trust, appeals to the Interior Department might have been made by the entrymen, and during the course of such appeals, action by the State Land Board, acting for the trustee, would have been stayed.

McDaid vs. Territory of Oklahoma, 150 U. S. 209, 37 L. Ed. 1055.
Sioux City & St. Paul R. Co. vs. United States, 159 U. S. 350, 40 L. Ed. 177.

The rule that the issuance of a final receipt in homestead and desert land claims, brings the land covered within the class of property subject to taxation by the State, has no application in this case, because by the grant a trust was created with the State as trustee, and by the term of the trust, no individual entryman is entitled, as a matter of right, to a patent until the trust is fully executed.

The requirements of the statute and the contract that an ample supply of water is actually furnished in a substantial ditch or canal, and the particular requirements of each individual entryman must concur before an entryman can have any claim whatever to patent. Moreover, proof of the concurrence of those things is required to be submitted to and examined and found to be satisfactory by the Secretary of the Interior or his agent, before the right to a patent can be complete. Such a finding goes to the foundation of the right. We direct the court's attention to the following provisions of the statute:

> "The Secretary of the Interior is authorized * * * to contract and agree * * * to donate, grant and patent to the state * * * such desert lands * * * as the state may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers."
>
> "That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section, but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.
>
> "As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of such lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the state, or its assigns, for said lands so reclaimed and settled, provided that said State shall not sell or dispose of more than one hun-

dred sixty acres of such land to any one person. * * *"

* * * "A lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to such State without regard to settlement or cultivation."

This provision of the amendment to the law was clearly intended to authorize the creation of a lien for the expenses of constructing the canal, and was not intended to dispense with the requirements of the original act respecting settlement, cultivation and irrigation, together with proof of those things. That was the view of the Secretary of the Interior, approved by the President, at the time of the execution of the contract, for those provisions were continued in the contract, and it was further provided that:

"All persons acquiring title to said lands from said State, prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said acts of Congress, and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands," and

"As soon as any of said lands may be irrigated and reclaimed as thoroughly as is now required of citizens who enter lands under the Desert Land Law and are occupied by actual bona fide settlers, who have cultivated twenty acres of the tracts upon which they have settled, the said State or its assigns may make proof thereof under and according to such rules and regulations as may be prescribed thereof by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory, patent shall issue to said State or to its assigns for the contracts included in said proofs."

No proof of reclamation was ever submitted by plaintiff in error to the Secretary of the Interior, or by one authorized by him to receive and accept the same.

The State court was content to rest its decision upon the so-called final certificate, issued June 25th, 1909, notwithstanding the Secretary of the Interior rejected the proof offered by the State, and threatened to cancel the contract and throw all the land open to entry. The court recognized the necessity of the submission, examination and approval of the proof, but seemed to assume that the State Land Board was the body authorized to receive and pass upon the evidence of cultivation and irrigation. The contract, by providing that "All persons acquiring title to such land from said State *prior to the issuance of patent, as hereinafter mentioned,* will take the same subject to the requirements of the Act of Congress," clearly left it with the Secretary of the Interior to accept or nullify any proof theretofore made to the State Land Board, if indeed that Board ever had any authority to receive and pass upon the proof.

The action of the Secretary of the Interior respecting the proof would seem to end all controversy as to the force or effect of the final receipt. Moreover, it is submitted that the requirements of the submission of proof by the State or its assigns, clearly indicate an intention on the part of the Interior Department to require the submission of proof to it, and not by the individual land claimant to the State. It is simply the case of one of the contracting parties requiring the submission to it of proof of the performance of the contract by the other party, or its assigns. If we are correct in this interpretation of the contract, then it follows that no proof was ever made to the Secretary of the Interior, and consequently the trust was not executed, and the plaintiff in error was never entitled, as a matter of right, to the patent to the land. It is not material that all these questions were apparently concluded by the actual execution and delivery to plaintiff of the patent by the State and the acquiescence of the Interior Department.

Even though the State was authorized, after the issuance of patent to it, to receive and examine the proof, there was never a time, at least before the actual issuance and delivery of patents to the claimants, that it was not only its right, but its duty to challenge the sufficiency of the reclamation of the land or its occupation by the actual settlers under the terms of the

statutes and the contract. In the performance of this duty, neither the State nor its officers or agents could ever estop it from requiring a full compliance with the law. The utmost good faith was required at the hands of the State, and consequently it must not be presumed that the State deliberately disqualified itself from executing the trust, by itself taking a position that would compel it to issue the patent, regardless of a full and complete compliance with the terms of the trust, or to retain the trust property encumbered with a tax lien in favor of itself as trustee. If in the judgment of the officers of the State, full and complete compliance with the requirements of the statute had not been made by the land claimant, it would have been the duty of the State to refuse the patent, and in doing so, if the tax is valid, it would have left the lands burdened with a tax lien for general State purposes.

Moreover, the doctrine of relation has no such application as would justify the court in holding that the proof made on May 15th, 1909, should be considered as if made after the land had been clear-listed for patent, because the statute and the contract contemplate the actual and bona fide settlement, cultivation and irrigation of the land at the time the patent issues. There is no presumption that the settlement, cultivation, irrigation and reclamation made up to May 15th, 1909, continued after that season, or that there was in 1911 a concurrence of all acts required both of the State and of the individual settler, justifying the issuance of a patent. Proof of the continuation of such settlement as was made in 1909 was required. It is common knowledge in the arid region that land once irrigated and reclaimed, upon abandonment, either of the land or of the irrigation works, at once reverts to its native desert state.

The amendment to the Act clearly negatives the right to load the land, conveyed to the State in a body, with a tax lien and thereby defeat the express terms of the statute, which requires: "Any surplus of money derived by any State from the sale of said land, in excess of the cost of the reclamation, to be held by it as a trust fund."

There is no guide except the actual issuance of the patent for any assessor in determining which land of the entire tract, covered by the Federal patent of January 18th, 1911, shall be assessed and taxed and which shall not. If he had the power to assess land which he thought would be patented in February, he might have, with equal authority, assessed land which he thought would be ready for patent in March, April,

or any other month of the year. The State, by permitting such assessments, would either take from the Secretary of the Interior the important function of determining the sufficiency of the proof of reclamation and settlement of any given tract of land, or take the risk of being put in the embarrassing position of continuing a tax lien upon the trust property. Such an awkward position is avoided by the assessor assessing land in the name of the person in whom the title stands on the second Monday in January, as required by the statute.

Whether the land came within the class of property subject to taxation during the year 1911, is determined as of the date of January 9th, 1911, when the tax lien attached.

The Supreme Court of the State, while holding that the lien attached as of the 9th day of January, 1911, took the position that it was not concerned with the question of the effect of the tax lien in the event the State failed for any reason to issue the patent to the plaintiff, or of the right of the State to thereafter sell for taxes. (Tr. 29.)

Mr. Justice Miller, delivering the opinion of this Court in Union Pacific Railroad Company vs. McShane, 89 U. S. 444, 22 L. Ed. 747, 22 Wall. 444, said:

> "The United States retains the legal title by withholding the patent for the purpose of securing the payment of these expenses, and it cannot be permitted to the States to defeat or embarrass this right by the sale of the land for taxes. If such a sale can be made, it must be valid, if the land is subject to taxation and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax, and the Treasurers of the counties have no right to assess it for that purpose. But when the United States parts with her title, she has parted with the only means which that section of the statute gives for securing payment of these costs."

It may with equal force be said that the United States, or the State of Idaho, as its trustee, by the contract, withheld the title until all the things required to constitute reclamation of the land had been done. When the State, as such trustee, parted with the title by the issuance of the patent, it parted with the only means it had of securing the reclamation of the

land by actual settlement, and of preventing the land from going into the hands of speculators. A sale for taxes would have dispensed with the submission of proof of cultivation and reclamation to the Secretary of the Interior, in direct violation of the terms of the contract, and would otherwise have violated the contract, because such a sale would not have been "to aid the public land States in the reclamation of the public lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers," but would have been simply to increase the tax receipts of the State, and the State would thereby "dispose of the same in a way other than to secure their reclamation and cultivation and settlement" in tracts perhaps of more than one hundred sixty acres to one person, and to individual or corporation tax title buyers, and not to bona fide settlers. Moreover, the proceeds from such sale would not be held "in a trust fund to be applied under the direction of the Secretary of the Interior to the reclamation of other desert lands within said State," and of course the State could not have kept "an accurate account" of the moneys received from the sale of the land to be expended in the reclamation of other land.

The Supreme Court of Idaho misconceived the law, when it treated this as a moot question.

It is respectfully submitted that the judgment is erroneous and the case should be reversed with directions to grant the injunctive relief prayed for.

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IN THE

Supreme Court of the United States

GLEN R. BOTHWELL,
Plaintiff in Error,

vs.

BINGHAM COUNTY, STATE OF IDAHO; HEBER C. C. RICH, ASSESSOR AND EX-OFFICIO TAX COLLECTOR FOR BINGHAM COUNTY, STATE OF IDAHO,
Defendants in Error.

UNITED STATES OF AMERICA,
STATE OF IDAHO,
COUNTY OF ADA, } ss.

E. G. Davis, being duly sworn, on his oath deposes and says that he is Assistant Attorney General of the State of Idaho and one of the attorneys of record for defendant herein. That he resides at Boise, Idaho, and that W. A. Lee, leading counsel for the plaintiff in error resides at Blackfoot, Idaho; that between Boise, Idaho, and Blackfoot, Idaho, there is a daily mail, and that on the 25th day of February, 1915, this affiant deposited in the United States registered mail at Boise, Idaho, addressed to said W. A. Lee, a copy of the brief of defendant in error in the above entitled action.

Further affiant sayeth not.

(Sgd.) E. G. DAVIS,
Assistant Attorney General of the State of Idaho, and
Attorney for Defendant in Error.

Subscribed and sworn to before me this 25th day of February, 1915.

(Sgd.) I. W. HART,
Clerk of the Supreme Court.

[SEAL]

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Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This case involves the right of Bingham County, one of the counties of the State of Idaho, to assess for taxation in the year 1911 a certain tract of land belonging to the plaintiff in error.

Under the federal statute known as the Carey Act (28 Stat. L. 422 and as amended by 29 Stat. L. 434), the Secretary of the Interior for and on behalf of the United States on the 19th day of July, 1899, entered into a contract with the State of Idaho for the segregation and irrigation of certain land in the State of Idaho, aggregating some 51,187.45 acres. This contract is set out in full in transcript, pages 2, 3 and 4. Under the authority of the said federal statute, and in pursuance of the contract made with the federal gov-

ernment, the State of Idaho on February 23, 1901, entered into a written contract with the American Falls Canal & Power Company for the construction of the works necessary to divert water for the irrigation of the lands segregated as above indicated. (Tr. f. 8, pp. 4-5.)

Included within the lands so segregated was a tract of 150.64 acres described as the NW¼ of SE¼ and the NE¼ of SW¼ and lot 4, being the SE¼ of SW¼ and the SW¼ of SW¼ of Sec. 18, Twp. 4 S. R. 33 E. B. M., which the plaintiff in error, Glen R. Bothwell, long prior to June 1909, made application to the State of Idaho in the manner prescribed by law to enter, and for which he paid the prescribed fee of twenty-five ecnts (25c) per acre. (Tr. f. 26½ p. 15.)

On May 15, 1909, the plaintiff in error appeared before Lorenzo R. Thomas, an agent of the State Board of Land Commissioners of the State of Idaho, at Blackfoot, Idaho, and made proof as required by law of such settlement and cultivation as entitled him to receive from the State of Idaho patent for his said land, and at the same time made the final payment of twenty-five cents per acre, and all other charges and fees required to be paid as a preliminary requisite to the issuance of patent. The said proof so offered was accepted by the State Board of Land Commissioners on the 25th day of June, 1909, and a final certificate of entry issued. (Tr. f. 27, p. 16.)

It is conceded in the stipulation of facts that no further payment by plaintiff was required, and that no further act remained to be performed with reference to the entry in question prior to the issuance of patent to the State of Idaho, and to the plaintiff in error, and that he was not thereafter required to make any further payment or perform any further act with reference to the said entry before obtaining patent therefor. (Tr. f. 27 p. 16.)

On December 21, ~~1911~~ 1910, upon a showing made to the Department of the Interior which the said Department considered satisfactory, the Secretary of the Interior clear listed "list for patent No. 5" for patent to the State of Idaho, which included the lands of the plaintiff in error, above described, and on January 9, 1911, patent therefor was duly issued to the State of Idaho. (Tr. f. 29, p. 17.)

On February 10, 1911, the State of Idaho issued its patent to the plaintiff in error for the lands in question. (Tr. f. 30, p. 17.)

Section 1653, Revised Codes of Idaho (1909) as the same existed in 1911, provided in part as follows:

> "Sec. 1653. All taxable property shall be assessed in the county, city or district in which it is situated on the second Monday in January, or, if not within the State on that day, on the day of assessment; the assessor must, between the second Monday in January and the first day of July in each year ascertain the names of all tax-

> able inhabitants and all property in his county, subject to taxation, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock noon of the second Monday of January next preceding, or on the day of assessment as aforesaid; but no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid."

Under the authority of Sec. 1653, Revised Codes of Idaho (1909), the assessor and tax collector of Bingham County, Idaho, valued the lands, acquired as hereinbefore set out by plaintiff in error, at the sum of $3,880.00, and levied against the said lands an assessment of $36.86, the lien of which attached to the said lands under date of January 9, 1911, the very date on which the lands within the segregation in question were patented to the State of Idaho.

The sole question involved in this case is, therefore, the question as to whether the lands of plaintiff in error under the facts hereinbefore stated were properly taxed by the defendants in error for the year 1911.

ARGUMENT.

Plaintiff in error is estopped from asserting the insufficiency of the representations upon which he obtained title to his land.

It is evident at once that plaintiff's complaint is without equity, and it may well be questioned if it shows good faith since the plaintiff in error takes the

position of questioning in this proceeding the sufficiency of the very proof which he himself offered as sufficient to entitle him to the patent which was issued to him by the State of Idaho on February 10, 1911. (Tr. f. 26½, p. 15 and ff. 30-31, pp. 17-18.) Having obtained title to his land as a result of his showing that he had complied with both the laws of the United States and the State of Idaho with regard to settlement and cultivation, he will not be heard by this court to deny the sufficiency of such showing for the purpose of escaping his just share of the burdens of government.

> "One who by his acts or representations or by his silence when he ought to speak intends, or through culpable negligence induces, another to believe certain facts to exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped from interposing such denial."
>
> Kirk vs. Hamilton, 102 U. S. 68; 26 L. Ed. 79.

> "A railroad company which has assumed and exercised rights on an Indian Reservation which it could possess only by virtue of the consent of the Indians, cannot allege the want of such consent to escape taxation."
>
> Maricopa & P. R. Co. vs. Arizona, 156 U. S. 347; 39 L. Ed. 447.

> "A party is not permitted to contradict statements or admissions contained in pleadings or papers executed in judicial proceedings."

Sample vs. Barnes, 14 How. 70, 14 L. Ed. 330.

"One to whom a certicate of stock has been issued, and who has received a dividend is estopped from denying his ownership of it."

Sanger vs. Upton, 91 U. S. 56; 23 L. Ed. 220.

"Whether the exclusion was erroneously directed or not, we are not now called upon to determine, for the relator cannot be heard to insist that it was. The action of the court was in this particular exactly what he asked. He presented a petition asking that such property should be excluded from the levy, and he cannot now be permitted to complain in this court of an order made in the inferior court at his instance."

U. S. ex rel Brown vs. City of Memphis, 97 U. S. 284; 24 L. Ed. 937.

"At all events, it does not lie in the mouth of a party in equity to complain that the court assumed his pleadings made under oath to be true and decreed accordingly."

Cavender vs. Cavender, 114 U. S. 464; 29 L. Ed. 212.

"A party cannot allege as error the admission of evidence introduced by himself."

McGillin vs. Bennett, et al, 132 U. S. 445, 33 L. Ed. 422.

The question involved in this case is the date on which title to his lands, sufficient for purposes of taxation, passed to the plaintiff in error.

It is difficult to follow the somewhat involved and wholly illogical argument of counsel for plaintiff in

error, or to even hazard a guess as to which of the many assignments of error they intend their brief to relate. In assignments 8 to 10, inclusive, it is claimed that the attempt to tax the land of plaintiff in error for the year 1911 is in violation of the contract clause of the constitution of the United States, and an abridgment of the privileges and immunities of plaintiff in error, as well as a taking of his property without due process of law, but there is neither argument nor citation of authorities to support these contentions. We shall not consume the time of the court in arguing that these contentions have no merit, for this is self-evident. Taxes were levied against the particular property equally with all other property in the defendant county for the year 1911. There is no question of the regularity of the assessment, no question of its uniformity with other assessments in the same taxing unit, and no question of the right of the county to collect, in general, such taxes as were imposed on the property of the plaintiff in error. As a matter of fact, the only question to be determined is whether there had passed to the plaintiff in error, on or prior to the 9th day of January, 1911, such title to his land as would make the property taxable on that date. And even this question, the plaintiff in error is estopped from raising, as we have shown above, on the ground that his proof was insufficient, or that it was prematurely made, or made before the wrong parties.

The question of when a taxable title passed to the plaintiff in error, must be determined from a consideration of the language of the Carey Act, the facts in this particular case, and the general rules governing the passing of title under patents of the Federal Government.

The Carey Act as it was enacted in the year 1894 (28 Stat. L. 422) authorizes the Secretary of the Interior, with the approval of the President, to enter into a contract to donate to the public land states such desert lands not exceeding one million acres in each state "as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres in each one hundred and sixty-acre tract cultivated by actual settlers * * * as thoroughly as is required of citizens who may enter under the * * desert land law." With reference to the patenting of segregated Carey Act land, the federal statute, as originally enacted provided as follows:

> "As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the *State or its assigns* for said lands so reclaimed and settled."

To this part of the statute was added a proviso:

> "That said states shall not sell or dispose of more than one hundred and sixty acres of lands

> to any one person, and any surplus of money derived by the State from the sale of said lands in excess of the cost of their reclamation shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State."

The Carey Act as it was enacted in 1894, was amended in 1897 (29 Stat. L. 434) by a provision which authorized the public land states entering into Carey Act contracts to create a lien against such land "for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

It will be noted that the original act provided a method for obtaining patents only as fast as a State may furnish satisfactory proof that any of the segregated lands "are irrigated, reclaimed and occupied by actual settlers," patents in such cases to be issued either to the *State or to its assigns* for said lands so reclaimed and settled. The amending act in 1897 provided an additional method of acquiring patent from the federal government for segregated Carey Act land. This later act provided that,—

> "When an amply supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to *such State* without regard to settlement or cultivation."

Counsel for plaintiff in error attempt to make capital out of the fact that no proof of reclamation and

settlement by the plaintiff in error was ever submitted to the Secretary of the Interior, or to one authorized by him to receive and accept such proof. But it is clear that this point is not worthy of serious consideration. Under the Carey Act, as first enacted, the State might have furnished proof of settlement and reclamation by the plaintiff in error of his particular land, and thus obtained, either in its own name or in the name of plaintiff in error as its assign, a patent from the federal government for that particular tract of land. If the State should desire to obtain patent for the entire segregated area, it had authority to proceed under the Carey Act as amended in 1897 (29 Stat. L. 434), and by offering proof that it had "an ample supply of water * * * in a substantial ditch", secure from the federal government in its own name a single patent for the entire tract. The State of Idaho followed the latter method of making proof and in this way obtained from the federal government, on January 9th, 1911, a single patent in its own name for the entire tract of land which included the lands of the plaintiff in error. (Tr. ff. 28-29, pp. 16-17.)

It was never the intention of the Carey Act to require that individual settlers should make their proof direct to the Secretary of the Interior or to some one appointed by him for that purpose. The original act provided that "as fast as any *State* may make satisfactory *proof* * * * patents shall be issued to *the State*

or its assigns," and in the Act as amended in 1897 an entirely new and additional plan was provided for the patenting of these desert lands which provided for a showing *by the State* of the completion of a sufficient irrigation system and the obtaining of an ample supply of water, patents to issue *direct to the State* making the showing. Under the first plan, it is obvious that the State could not possibly make the proof to the Secretary of the Interior until the individual settlers on the land had made their proofs of settlement and reclamation to the State; and, under the second plan, the State being granted the patent for an entire tract, it is obvious that it would hold the same in trust for the settlers thereon, and that such settlers for the purpose of obtaining individual patents must make proof to the State of reclamation and settlement. It is too clear for argument that the State has an option as to the particular plan which it may adopt for the securing of patent, and it is also clear that the settler is given authority to make his proof of settlement and reclamation as soon as he desires after such reclamation and settlement have been completed, under such rules and regulations as may be established by the State, in pursuance of the federal statute prescribing the extent of the cultivation and settlement required.

The plaintiff in error, as shown by the record (Tr. f. 26½, p. 15), long prior to June, 1909, entered his land in question and on the 15th day of May,

1909, submitted proof to the agent of the State Board of Land Commissioners of the reclamation, cultivation and settlement of his entry. The extent of cultivation necessary to be shown in making such proof was, "not less than twenty acres of each one hundred and sixty acre tract * * * as thoroughly as is required of citizens who * * * enter under the * * * desert land law." This proof was accepted by the State Board of Land Commissioners, and a final certificate issued under date of June 25, 1909, at which time all remaining fees, charges, etc., were paid, and nothing remained to be done by the plaintiff in error prior to the receipt of his patent, and nothing was done thereafter by him prior to the receipt of said patent. (Tr. f. 27, p. 16.) In other words, as early as June 25, 1909, the plaintiff in error had made all payments, and had performed each and every act necessary to entitle him to a patent for his lands.

Having received such proof of reclamation and settlement by the plaintiff in error, it was competent for the State under the Carey Act as originally enacted (28 Stat. L. 422) to apply to the federal government for a patent for this particular tract, either in its own name or in the name of the plaintiff in error as its assign; or, under the Carey Act, as amended in 1897, the State had the option of waiting before applying for patent until "an ample sup-

ply of water was actually furnished in a substantial ditch," and then apply for a patent for the entire segregation. The latter method was adopted, and the patent secured, as hereinbefore indicated. It being admitted that at the time this patent was issued, the plaintiff in error had made all payments and performed all acts necessary to entitle him to patent (Tr. f. 27, p. 16), and the State having accepted the proof of reclamation and settlement, it is entirely clear that the plaintiff in error was on the day the patent was issued by the United States the equitable owner of his land, and that the naked legal title only was in the State of Idaho, as agent for the federal government in transferring patent to the plaintiff in error. This being true and the equitable title having passed to the plaintiff in error by the performance of every act going to the foundation of the right, the land was on that date subject to state taxation.

In connection with the proposition just stated, we desire to invite the attention of the court to the opinion of the Supreme Court of Idaho in this case as set forth on pages 27-28 of the transcript. The reasoning there given on the point here involved is, we believe, entirely correct and wholly unanswerable.

As authorities bearing on the point here at issue, we desire to make the following citations:

> "He who has the right to property and is not excluded from its enjoyment will not be permit-

ted to use the legal title of the government to avoid his just share of state taxation."

N. P. R. Co. vs. Patterson, 154 U. S. 130; 38 L. Ed. 934.

"When the full equitable title to public land has passed to a railroad company, and the government holds simply a naked legal title, such land is subject to state taxation."

Winona & St. P. Land Co. vs. Minnesota, 159 U. S. 526; 40 L. Ed. 247.

"When the full equitable title to public lands has passed from the government, even prior to the issue of patent the land is subject to state taxation."

Hussman vs. Durham, 165 U. S. 144; 41 L. Ed. 664.

"Taxation upon lands held under a final certificate, but for which a patent has not been issued, is not a violation of the ordinance of 1787, as an "interference with the primary disposition of the soil by Congress", nor is it a tax upon the lands of the United States."

Carroll vs. Safford, 3 How. 441; 11 L. Ed. 671.

"The fact that a patent has not issued to a railroad for public lands, and that it does not appear that the lands are not mineral lands, does not prevent the passing of an equitable title which is subject to taxation."

N. P. R. Co. vs. Clark, 153 U. S. 252; 38 L. Ed. 706.

> "A patent for any part of the public lands when issued by the Land Department, acting within the scope of its authority, carries with it, when delivered and accepted by the grantee, the legal title to the land, and with it passes all control of the executive department of the government over the title."
>
> Moore vs. Robbins, 96 U. S. 530; 24 L. Ed. 848.

In conclusion, we beg leave to invite the attention of the court to the following recapitulation of essential points:

1. The plaintiff in error made his proof of reclamation and settlement before the agent of the State Board of Land Commissioners of Idaho on May 15, 1909, and at this time made full payment of all fees and charges for the land in question.
2. The proof so made was accepted by the State Board of Land Commissioners and a final certificate issued on the 25th day of June, 1909.
3. A patent for the tract of land within which the land of plaintiff in error is situated was issued to the State of Idaho on the 9th day of January, 1911.
4. On this same 9th day of January, 1911, a tax lien for state and county taxes attached to the lands of plaintiff in error.
5. On the 10th day of February, 1911, the State of Idaho issued to plaintiff in error its patent for the lands on which he had made final proof as above indicated.

We desire to suggest, moreover, that in view of the facts herein outlined, the prosecution of the writ of error in this case can serve no higher purpose than the raising of a federal question which is at best

more fictitious than real. For more than a year prior to the filing of the original complaint in this action, the plaintiff in error had been in possession of his patent from the State of Idaho The sufficiency of this patent has never been questioned and the plaintiff has never been disturbed in his possession or control of his property. He had enjoyed the possession of a full equitable title to his property from the 25th day of June, 1909, up to its assessment in 1911, but rather than pay the small sum of $36.86, which was determined to be his just share of taxation for the year 1911, he chose to incur the expenses of this litigation, and has sought to impose upon this august tribunal the duty of determining whether the fact that the patent, which was issued to the State of Idaho in trust for the plaintiff in error on January 9th, 1911, did not reach him, in the course of administration, until the 10th day of February, 1911, is sufficient to enable the plaintiff in error to avoid the payment of his taxes for that year.

We are firmly of the opinion that the court would be fully justified in declining to assume jurisdiction of this case, but in any event, it is clear, both on reason and authority, that the decision of the court below should be affirmed and the writ of error dismissed.

Respectfully submitted,

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Attorneys for Defendant in Error.

BOTHWELL *v.* BINGHAM COUNTY, IDAHO.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 266. Argued May 6, 1915.—Decided June 1, 1915.

The determinative fact of whether property formerly part of the public domain of the United States is subject to taxation by the State is the absence of any beneficial interest in the land on the part of the United States at the time of the assessment.

Neither the Carey Act of August 18, 1894, nor the agreement thereunder with the State of Idaho in regard to irrigation of arid lands segregated from the public domain, purports to exempt the lands from taxation or take them out of the settled rule respecting taxation by the State of lands acquired under public land laws.

Where proceedings to acquire title to public land have reached the point where nothing remains to be done by the entryman, and the United States has no beneficial interest therein and does not exclude the entryman from the use thereof, the entryman is regarded as the beneficial owner and the land is subject to taxation, even though the legal title may not have been passed to him; and in this respect it is immaterial whether the title passes direct from the Government or through the State, under provisions of the Carey Act.

24 Idaho, 125, affirmed.

THE facts, which involve the construction of the Carey Act of August 18, 1894, and the right of the State to tax

property taken up thereunder by an entryman after he had become entitled to the patent, but before the patent was issued, are stated in the opinion.

Mr. William A. Lee, with whom *Mr. J. D. Skeen*, *Mr. William H. Wilkins* and *Mr. Edward B. Critchlow* were on the brief, for plaintiff in error:

Section 4, Article 7, of the constitution of the State of Idaho, provides: that the property of the United States, the State, counties, towns, cities and other municipal corporations, and public libraries, shall be exempt from taxation. This constitutional provision but affirms the law of the United States. *McCullough* v. *Maryland*, 4 Wheat. 316; *Van Brocklin* v. *Anderson*, 117 U. S. 151.

The principle is qualified, however, to the extent that where the United States holds only the naked legal title to the land and the full equitable title has passed by the performance of every act going to the foundation of the right, the land is subject to state taxation. *Kansas Pacific R. R.* v. *Prescott*, 16 Wall. 603; *Union Pacific R. R.* v. *McShane*, 22 Wall. 444; *Central Colorado Imp. Co.* v. *Pueblo County*, 95 U. S. 259; *Hussman* v. *Durham*, 165 U. S. 144.

It follows that if, as in this case, the United States conveys land to a State in trust for a specific purpose, something more than a mere naked title is retained until the trust is fully executed by the trustee. Every act going to the foundation of the right is not performed until the trustee divests itself of the trust property, and in this case it could be done only by the issuance of patent. *Tucker* v. *Ferguson*, 22 Wall. 572.

The issuance of the patent by the United States to the State of Idaho did not terminate the control over the land by the United States. By the terms of the grant its control was continued until actually disposed of by the issuance of the patents to the individual entrymen. While it continued to hold the title in trust, appeals to the

Interior Department might have been made by the entrymen, and during the course of such appeals, action by the State Land Board, acting for the trustee, would have been stayed. *McDaid* v. *Oklahoma*, 150 U. S. 209; *Sioux City & St. Paul R. R.* v. *United States*, 159 U. S. 350.

The rule, that the issuance of a final receipt in homestead and desert land claims brings the land covered within the class of property subject to taxation by the State, has no application in this case, because by the grant a trust was created with the State as trustee, and by the term of the trust, no individual entryman is entitled, as a matter of right, to a patent until the trust is fully executed.

No proof of reclamation was ever submitted by plaintiff in error to the Secretary of the Interior, or by anyone authorized by him to receive and accept the same.

Whether the land came within the class of property subject to taxation during the year 1911, is determined as of the date of January 9, 1911, when the tax lien attached. *Union Pacific R. R.* v. *McShane*, 22 Wall. 444.

The United States, or the State of Idaho, as its trustee, by the contract, withheld the title until all the things required to constitute reclamation of the land had been done.

Mr. R. W. Adair and *Mr. J. H. Peterson*, Attorney General of the State of Idaho, with whom *Mr. E. G. Davis*, Assistant Attorney General of the State of Idaho, was on the brief, for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court.

This was a suit to enjoin a proposed sale for taxes of 150 acres of land in Idaho acquired under the Carey Act of August 18, 1894, § 4, c. 301, 28 Stat. 422, and the amenda-

tory acts of June 11, 1896, c. 420, 29 Stat. 434, and March 3, 1901, § 3, c. 853, 31 Stat. 1188, the objection urged against the sale being that the proceedings for the acquisition of the title had not at the time of the tax assessment reached the point where the land could be taxed by the State. At a hearing upon an agreed statement of facts the defendants prevailed and the Supreme Court of the State affirmed the judgment. 24 Idaho, 125.

The tract was part of upwards of 50,000 acres of arid lands which were segregated from the public domain in July, 1899, pursuant to an agreement, sanctioned by the Carey Act, whereby the State engaged to have the lands irrigated, reclaimed and brought under cultivation, and to dispose of them only to actual settlers in tracts of not exceeding 160 acres. Originally the act required that the reclamation be accomplished within ten years after the date of the act, but the amendment of 1901 directed that the ten years be computed from the approval of the State's application for the segregation and empowered the Secretary of the Interior, in his discretion, to prolong the period five years.

In the original act there was a provision that "as fast as any State may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled," and the amendment of 1896 brought into the act a further provision that "when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation."

Following the segregation in 1899 the State took appropriate steps to provide canals and a supply of water

whereby the lands could be irrigated, reclaimed and brought under cultivation, and before December, 1910, caused to be completed a suitable system of canals actually furnishing an ample supply of water to irrigate and reclaim 49,858.16 acres, including the tract in question. Proof of this was made to the Secretary of the Interior in the mode prescribed by existing regulations (see 26 L. D. 74; 37 L. D. 624, 631) and that officer, finding the proof sufficient, directed that the 49,858.16 acres be patented to the State. This direction was given December 21, 1910, and the patent was issued January 9, 1911.

While the canal system was in process of completion and after water was provided for some of the lands, the plaintiff, who possessed the necessary qualifications and had acquired the requisite perpetual water right, applied to the State to make entry of the tract in question and made the prescribed preliminary payments. See Idaho Rev. Codes, 1908, § 1626. The entry was allowed and the plaintiff settled upon the tract, made it his place of residence, irrigated and reclaimed it, and brought it under actual cultivation. Thereafter, on June 25, 1909, he submitted to the State due proof of what he had done, paid the balance of the purchase price, and received from the State a certificate of final entry. See Rev. Codes, § 1628. Nothing more was required of him by the Carey Act, by the law of Idaho, or by any regulation made under either. He received a patent from the State February 11, 1911, about a month after it received one from the United States.

January 9, 1911, the day the State received a patent from the United States, was the date as of which property was required by the law of Idaho to be assessed for taxation for the ensuing year. Rev. Codes, § 1653. This tract was so assessed and the tax in question was based upon that assessment. The assessment, the tax and the intended sale were all free from objection, if the tract was

within the taxing power of the State on January 9, 1911.

At that time the United States no longer had any beneficial interest in the tract. Every condition upon which the ownership was to be transferred to the plaintiff had been fully performed. Thus the equitable title had passed to him and he had a present right to the legal title. The State received the latter as a trustee for him and was in duty bound to give him a patent—a duty which it promptly discharged, although not until after the time for the assessment.

Neither the Carey Act nor the agreement thereunder with the State purported to exempt the land from taxation or to take it out of the settled rule respecting the taxing of lands acquired under the public land laws. According to that rule, as this court frequently has said, when the proceedings for the acquisition of the title have reached the point where nothing more remains to be done by the entryman, and the Government no longer has any beneficial interest in the land and does not exclude the entryman from the use of it, he is regarded as the beneficial owner and the land as subject to taxation, even though the duty of passing the legal title to him has not been discharged—the principle underlying the rule being that one who has acquired the beneficial ownership of the land, and is not excluded from its enjoyment, cannot be permitted to use the fact that the naked legal title remains in the Government to avoid his just share of state taxation. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 505; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 530; *Hussman* v. *Durham*, 165 U. S. 144, 147; *Sargent* v. *Herrick*, 221 U. S. 404, 406.

That the title was being passed through the State to the entryman or purchaser rather than by a direct conveyance is immaterial, the determinative fact being the

absence of any beneficial interest in the land on the part of the United States at the time of the assessment. It follows that no Federal law or right was infringed by the tax.

Judgment affirmed.